84-1602

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

– against –

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Can the constitutional requirement that evidence of actual malice in a public figure libel case be "clear and convincing" be disregarded for purposes of a defendant's motion for summary judgment?

2. Does the First Amendment require that a defendant's motion for summary judgment in a public figure libel action be granted when no more than nominal damages could be awarded after trial because the plaintiffs' reputations had previously been so diminished, by their own statments and those of others about them, that the statements they now challenge could not cause further harm?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. The Investigator Publishing Company is a Texas corporation. It does not have any subsidiaries or affiliates.

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No. 85 - _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

-against-

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Jack Anderson, The Investigator Publishing Company and Bill

E. Adkins respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on November 2, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 746 F.2d 1563 (D.C. Cir. 1984). The opinion of the district court is reported at 562 F. Supp. 201 (D.D.C. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1984. Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc with the Court of Appeals. The petition was denied on January 9, 1985. This Court has jurisdiction to review

the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISION INVOLVED

Rule 6(c) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 56(c), provides in pertinent part:

> Motion and Proceedings Thereon. The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

This petition arises from the District of Columbia Circuit's reversal of the District Court's grant of summary

judgment dismissing a libel action brought by Liberty Lobby, Inc., a not-for-profit corporation, and its founder Willis Carto.[1] According to its complaint Liberty Lobby has as its purpose to advocate "patriotism, nationalism, lawfulness, protection of the national interests of the United States and the economic interests of its actions, and strict adherence to the United States Constitution and the form of government it establishes." App. C at 80-a. Liberty Lobby publishes a weekly national newspaper, The Spotlight, with more than 335,000 subscribers, and broadcasts both a daily radio commentary, "This is Liberty Lobby", carried over 460 stations, and a weekly half-hour television show on 30 stations. App. C at 80-a.

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[1] The basis for jurisdiction in federal court was diversity of citizenship (28 U.S.C. § 1332 (1982)).

In this action Liberty Lobby and Carto charged that certain articles which appeared in the October 1981 issue of a magazine called The Investigator contained some thirty statements which defamed them. Their complaint sought $24,000,000 in damages against Jack Anderson, the publisher of The Investigator; The Investigator Publishing Company, and Bill E. Adkins, its President.[2] The articles containing the challenged statements, "The Private World of Willis Carto" and "Yockey, Profile of an American Hitler" were written by Charles Bermant, an employee of defendants, and appeared with an introduction signed by "The Editors"

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[2] Two other individuals, William McGaw and Jay J. Armes, were dismissed as defendants in the District Court and no appeal was taken. The District Court also dismissed without appeal a count of the complaint which claimed that Jack Anderson had illegally converted certain files belonging to Liberty Lobby.

entitled "Did Mein Kampf Spawn Yockey's Imperium, a Book Revived By Carto's Liberty Lobby?" Collectively the three publications recounted the history and views of Liberty Lobby and Carto. As the district court correctly described them:

> Without doubt the plaintiffs are referred to as neo-Nazi, fascist, anti-Semitic and racist. The portrayals form the basis for plaintiff's libel complaint."

App. C at 82-a.

On August 19, 1982 petitioners moved for summary judgment on the grounds that the Liberty Lobby and Carto were public figures who could not meet their burden of proving actual malice, or, alternatively, were libel-proof. Petitioners' motion was supported by an affidavit of Charles Bermant, the author of the challenged articles, which detailed the investigation he made in

writing them and a detailed appendix that compiled the sources upon which Bermant relied. See Affidavit of Charles Bermant filed August 19, 1982 and Appendix thereto, App. D at 107-a, et seq.

On March 31, 1983 the district court granted defendants' summary judgment motion and dismissed the complaint with prejudice. The court considered "[t]he parties' memoranda of law, the several affidavits, and the entire record. . . ." App. C at 78-a. It concluded: "While it is claimed that there are numerous disputed facts in this libel suit, many are of limited, if any, consequence. The material underlying facts necessary for disposition of this motion for summary judgment are uncontested." App. C at 79-a. Because "the plaintiffs are unable to prove actual

malice, the defendants are entitled to summary judgment. . . ." App. C at 104-a. The district court did not reach the alternative "libel-proof" branch of petitioners' motion.

The Court of Appeals, while affirming the district court's grant of summary judgment with respect to twenty-one of the thirty allegedly libelous statements, reversed the summary judgment award as to the nine remaining allegations. App. B at 65-a, 66-a. In assessing the evidence of actual malice with respect to these nine alleged defamations the Court of Appeals expressly declined to apply the "convincing clarity" standard of proof constitutionally required at trial. The court recognized that Liberty Lobby and Carto as public figure libel plaintiffs carried this burden but held that they would be ex-

cused from meeting it at the summary judgment stage of the litigation:

> "With regard to the 'clear and convincing' evidence requirement, the issue can be framed as follows: whether, in order to deny the defendant's motion for summary judgment, the court must conclude that a reasonable jury not only could (on the basis of the facts taken in the light most favorable to the plaintiff) find the existence of actual malice, but could find that it had been established with 'convincing clarity.' We conclude that the answer is no."

App. B at 28-a, 29-a.

Terming the libel proof doctrine a "bad idea", the Court of Appeals also rejected petitioners' argument that summary judgment should be granted because the reputations of Liberty Lobby and Carto had been so irreparably debased by other publications by and about them and because the portions of the articles now claimed to be defamatory

could not, as a matter of law, cause them further harm. App. B at 15-a, 16-a, 17-a, 18-a.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals held inapplicable to motions for summary judgment this Court's requirement, stated in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), that actual malice in public-figure libel cases be proved with "convincing clarity". In so holding the Court of Appeals eliminated the "convincing clarity" requirement at the point in the litigation at which its purpose can best be served and, thereby, impermissibly hampered the effectiveness of this constitutional safeguard. The Court of Appeals' ruling stands in conflict with other Circuits which regularly apply the "clear and convincing" evidentiary standard at the summary

judgment stage of public figure libel litigation: Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 942 (2d Cir.), cert. denied, 449 U.S. 839 (1980); Rebozo v. Washington Post Co., 637 F.2d 375, 381 (5th Cir.), cert. denied, 454 U.S. 964 (1981); Fadell v. Minneapolis Star & Tribune Co., 557 F.2d 107, 108 (7th Cir.), cert. denied, 434 U.S. 966 (1977).

2. In public figure libel cases this Court should require that a plaintiff's reputational interest in avoiding adverse comment be weighed against the First Amendment's call for "uninhibited, robust and wide-open" debate. New York Times Co. v. Sullivan, 376 U.S. at 271. The plaintiffs in this case, Liberty Lobby and Carto, are professional polemicists for extreme causes. "[H]owever

reprehensible" their anti-Semitic and racist message, as Justice Burger noted in a 1968 case involving Liberty Lobby, it is "within the areas covered by the First Amendment." Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 n.7 (D.C. Cir. 1968). By the same token the First Amendment must bar Liberty Lobby and Carto from using the libel law as a bludgeon to stave off public comment on their activities. Here, where the reality is that Liberty Lobby and Carto have no reputations to protect, ordinary tort law causation principles that require summary dismissal of their claims are reinforced by compelling First Amendment concerns.

ARGUMENT

I

THE RULE ESTABLISHED BY THE COURT OF APPEALS BELOW IMPERMISSIBLY WEAKENS THE CONSTITUTIONAL PROTECTION PROVIDED BY THE ACTUAL MALICE REQUIREMENT OF TIMES v. SULLIVAN

In Bose Corp. v. Consumers Union of the United States, Inc., _____ U.S. _____, 104 S. Ct. 1949 (1984), this Court reaffirmed its insistence that an appellate court in a public figure libel case has an obligation to "'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" Id. at 1958, quoting, New York Times Co. v. Sullivan, 376 U.S. at 284-86. The Bose Court said:

> "The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not

> merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Id. at 1965.

The same First Amendment concerns that compel independent judicial review of a finding of actual malice by clear and convincing evidence at the trial and at the appellate stage of a litigation require application of that evidentiary standard at the summary judgment stage. "Convincing clarity", this Court said in Bose, is a question of constitutional law as well as of fact and it is such on a motion for summary judgment just as much as at any other point in the case. Summary procedures are indeed especially important to the preservation of First

Amendment rights in public figure libel cases because of their role in cutting off unfounded claims before harassment occurs and expression is chilled. As the court said in McBride v. Merrell Dow and Pharmaceuticals, Inc., 717 F.2d 1460, 1467 (D.C. Cir. 1983), quoting Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967):

> "For the stake here, if harassment succeeds, is free debate. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open. . . ."

Id. at 1467.

In Hutchinson v. Proxmire, 443 U.S. 111, 120 (1979) this Court in dicta cast doubt upon the soundness of any

"rule" favoring defendants on summary judgment motions in libel cases, noting that "[W]e are constrained to express some doubt about the so-called 'rule' [because] [t]he proof of 'actual malice' calls a defendant's state of mind into question. . ., and does not readily lend itself to summary disposition." 443 U.S. at 120, n.9. The Court of Appeals erroneously interpreted this caution as license to dilute the constitutionally-required "clear and convincing" burden of proof and thereby favor libel plaintiffs at the summary judgment stage -- a result this Court could scarcely have intended by the Hutchinson footnote.

The aberrant rule fashioned by the Court of Appeals stands in open conflict (see App. B at 32-a) with other courts which have continued routinely to apply the "clear and convincing" standard at

the summary judgment stage just as it is applied at trial or on motion for directed verdict, judgment n.o.v. or on appeal. See, e.g., Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 940 (2d Cir.), cert. denied, 449 U.S. 839 (1980) ("[A] judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, 'a reasonable jury could find malice with convincing clarity'"), quoting, Nader v. de Toledano, 408 A.2d 31, 50 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980) (emphasis by the Nader court); Rebozo v. Washington Post Co., 637 F.2d 375, 381 (5th Cir.), cert. denied, 454 U.S. 964 (1981) ("Since . . . a jury verdict in a defamation case can only be supported when the actual malice is shown by clear and convincing

evidence . . . the evidence and all the inferences which can reasonably be drawn from it must meet that higher standard [on motion for summary judgment]"; Washington Post Co. v. Keogh, 365 F.2d 965, 976 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967) (McGowan, J. concurring) ("The question before us [at the summary judgment stage] essentially is: . . . would Keogh have been entitled to get to the jury on the issue of . . . reckless disregard. . . ."). Accord, Lorain Journal Co. v. Milkovich, cert. denied, 449 U.S. 966, 966 n.1 (1980) (Brennan, J., dissenting).

The requirement that actual malice be proved with convincing clarity is a fundamental element of the Times v. Sullivan holding -- a holding this Court has repeatedly affirmed "as the appropriate First Amendment standard appli-

cable in libel actions brought by public officials and public figures." Herbert v. Lando, 441 U.S. 153, 169 (1979). The Court's decision in New York Times Co. v. Sullivan suggests no rationale for limiting application of the convincing clarity standard to only some stages of a public figure libel case. Yet it is precisely this limited application that the Court of Appeals' decision mandates. In suspending application of the "convincing clarity" standard of proof until after trial has commenced the Court of Appeals' holding guts the protection provided in New York Times Co. v. Sullivan and required by the First Amendment.

Established procedures governing the award of summary judgment also fail to support the bifurcated burden of proof that the Court of Appeals invented

in this case. Under Fed. R. Civ. P. 56(c) a party seeking to defeat a motion for summary judgment must show "sufficient evidence supporting the claimed factual dispute" so as to "require a jury or judge to resolve the parties' differing versions of the truth at trial." First National Bank v. Cities Service, 391 U.S. 253, 288-89 (1968). Implicit in this rule is the requirement that the standard of proof applicable at trial also applies at summary judgment. The Court of Appeals' holding is similarly contrary to the black letter rule of law that if a party moving for summary judgment would have been "entitled . . . to a directed verdict at trial, he is entitled to a summary judgment under Rule 56." United States v. General Motors Corp., 518 F.2d 420, 442 (D.C. Cir. 1975). This rule has been applied

to civil cases of all kinds.3/ It is clear, simple and, prior to the Court of Appeals' decision, unexcepted.

Out of whole cloth -- and thin air -- the Court of Appeals in this case created a special limitation on the constitutionally-required burden of proof in public figure libel cases: that burden of proof, in the District of Columbia Circuit, will henceforth not be applied on motions for summary judgment but only at the conclusion of a trial which, had the proper standard been applied at the summary judgment stage, would never have been held. The Court

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3/ See, e.g., First National Bank v. Cities Service, supra, 391 U.S. at 288-89 (1968); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 624 (1944); Southmark Properties v. Charles House Corp., 742 F.2d 862, 877 (5th Cir. 1984); Schultz v. Newsweek, Inc., 668 F.2d 911, 918 (6th Cir. 1982); Bieghler v. Kleppe, 633 F.2d 531, 533 (9th Cir. 1980); Roberts v. Browning, 610 F.2d 528, 532 (8th Cir. 1979).

of Appeals' essay in creative jurisprudence requires correction not only because it violates the basic principles governing summary procedure which are followed by every other court as a matter of course, but also because it conflicts with the purpose that the "clear and convincing" barrier was erected to protect -- to screen out defamation claims by public figures which are inconsistent with the "uninhibited, robust, and wide-open" public debate guaranteed by the First Amendment. New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

II

WHERE, AS HERE, THE REPUTATIONS OF PUBLIC FIGURE LIBEL PLAINTIFFS ARE SO DEBASED THAT THEIR LEGAL INTEREST IN AVOIDING FURTHER INJURY IS MINIMAL BUT THE PUBLIC INTEREST IN ENSURING FREE DEBATE CONCERNING THEIR ACTIVITIES IS COMPELLING, FIRST AMENDMENT CONCERNS REQUIRE THAT SUMMARY JUDGMENT BE AWARDED TO DEFENDANTS

This case raises an important issue as to whether public figures such as Liberty Lobby can be heard to complain of injury to reputations which were demolished years ago through extensive publicity generated by as well as about themselves. In particular, petitioners ask this Court to consider whether the scrupulousness exhibited by the Court of Appeals to protect the reputations of Liberty Lobby and Carto did not entail the sacrifice of other, more compelling interests.

The record below is replete with examples of publicity generated by and about Liberty Lobby and Carto over a period of more than 20 years. The following excerpt from a 1980 article published by the Anti-Defamation League about Liberty Lobby's magazine The Spotlight is typical of the publicity the organization receives:

> The Spotlight, Liberty Lobby's principal newspaper, disseminates an array of racist, anti-Semitic propaganda reflecting the prejudices of its publisher, Liberty Lobby, a Washington-based far-right extremist organization. It is this effort to camouflage the true bigotry of its pages and to deceive its readers that make The Spotlight more insidious than other publications of its kind -- and distinguishes it from the crudes, more blatant hate sheets of the neo-Nazi organizations and Ku Klux Klan groups plaguing the American scene. Liberty Lobby, headed by Willis A. Carto, a long-time anti-Semite and its founder and treasurer. . . .

(App. D at 135-a 136-a.) See also, e.g., remarks of Representative Eilberg in the Congressional Record describing Liberty Lobby's message as a "vicious and clandestine brand of anti-Semitism" (App. D at 121-a); National Review's report of Carto's "preoccupation" with "'racial mongrelization'" (App. D at 149-a); and Los Angeles Times report that "'Carto wants a nationalist socialist dictatorship' in the United States" (App. D at 128-a, 129-a).

Even more telling of the public view of Liberty Lobby and Carto than the publicity they receive is that which they generate by their own writings, of which the following is an example:

> "Hitler's defeat was the defeat of Europe. And of America. How could we have been so blind? The blame, it seems, must be laid at the door of the international Jews. It was their propaganda, lies and denials which blinded the West. . . . If Satan himself

> had tried to create a permanent disintegration and force in the destruction of nations, he could have done no better than to invent the Jews."

App. D at 228-a, 229-a.

The record in the District Court on the subject of Liberty Lobby and Carto's reputation was clear as it is here: they are widely reputed to be anti-Semites, racists and admirers of Hitler. Since their reputations are so debased to begin with, the miscellany of statements[4] as to which the Court of Appeals

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[4] The allegations which the Court of Appeals remanded for trial were:

-- Allegation that Carto's "Joint Council for Repatriation" advocated forced deportation of blacks from the U.S. rather than (as plaintiffs concede) their "voluntary repatriation" to Africa. App. B at 69-a, 70-a; App. D. at 147-a to 154-a.

-- Allegation that Liberty Lobby occupies a building owned by a foundation whose Chairman is Carto, who bought the building with money contributed by Liberty Lobby, and that Liberty Lobby pays the foundation $6,000 per month

(footnote continued)

required a trial here could not as a matter of law have caused them harm. Just as summary dismissal is required when the court concludes that a chal-

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(footnote continued from previous page)
rent. App. B at 67-a; App. D at 144-a, 145-a.

-- Illustration suggesting that Carto emulated Hitler. App. B at 71-a; App. D at 157-a, 158-a.

-- Allegation suggesting Carto joined in singing the "Horst Wessel Lied" and made a speech emulating Hitler. App. 3 at 71-a, 72-a; App. D at 211-a, 212-a, 213-a.

-- Statement that Carto "conducts his business by way of conference calls from a public telephone." App. B at 72-a; App. D at 146-a.

-- Claim that in 1968 a Carto organization "used a direct mail blitz to support G. Gordon Liddy's congressional campaign in New York." App. B at 72-a; App. D at 146-a, 147-a.

-- Illustration showing Carto secretly observing prospective employees through a one-way mirror. App. B at 73-a; App. D at 155-a.

-- One-way mirror allegation, in text. App. B at 73-a; App. D at 188-a.

(footnote continued)

lenged statement could not be defamatory as a matter of law, so too is summary judgment appropriate where, as here, the allegedly defamatory statement could not as a matter of law be found to have caused damage.

The Court of Appeals' perception that the nine statements it remanded for trial could actually have caused injury to Liberty Lobby and Carto was, we submit, clear error. There is no conceivable damage to the reputation of a notorious racist from his being accused of advocating the forced deportation of blacks to Africa instead of "voluntary repatriation" (which, incidentally, he does advocate). The Court of Appeals was scrupulous to draw the moral dis-

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(footnote continued from previous page)
-- Claim that a lead story in The Spotlight was a hoax. App. B at 73-a; App. D at 209-a, 210-a.

tinction between these two views, App. B at 69-a, 70-a, but the existence of a moral distinction is not the issue: damage to reputation is the issue, and there could have been no such damage from the assortment of nine statements challenged here when their impact is measured against the universe of unchallenged public comment by and about plaintiffs and their activities.

In Simmons Ford, Inc. v. Consumers Union, 516 F. Supp. 742, 750-51 (S.D.N.Y. 1981), Judge Weinfeld, observing that plaintiffs "could not expect to gain more than nominal damages based on the addition to the article of the [challenged] misstatement," granted summary judgment for the defendant because he found that "plaintiffs' reputational interest in avoiding further adverse comment [was] minimal when com-

pared with the First Amendment issues at stake." Other courts have also denied recovery when the plaintiff's reputation has been irreparably stained by events prior to the challenged publication. Cardillo v. Doubleday & Co., 518 F.2d 638, 639 (2d Cir. 1975); Logan v. District of Columbia, 447 F. Supp. 1328, 1332 (D.D.C. 1978); Ray v. Time, Inc., 452 F. Supp. 618, 622 (W.D. Tenn. 1976), aff'd, 582 F.2d 1280 (6th Cir. 1978); Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 928 (C.D. Cal. 1982).

So too here, in view of the nature of respondents' activities and views as regularly expressed (see App. D at 120-a, et seq.), it must be seen that the reputational interest at stake as a result of the allegedly defamatory statements over which the Court of Appeals denied sumary judgment is de mini-

mis in comparison with the constitutional interest in ensuring free and open public scrutiny of the views and activities of Liberty Lobby and Carto. That open scrutiny should not be inhibited by lawsuits, such as this, which can have no result other than to expose defendants to the burden and expense of defending them.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

April 9, 1985

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

—against—

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

Order of the Court of Appeals

United States Court of Appeals
For the District of Columbia District

No. 83-1471 September Term, 1984

CA 81-02240

Liberty Lobby, Inc., et al., Appellants

v.

Jack Anderson, et al.

BEFORE: Edwards and Scalia, Circuit Judges and Harris, District Court Judge, U.S. District Court for the District of Columbia

O R D E R

On consideration of petitioners' petition for Rehearing, filed December 3, 1984, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

For the Court:

GEORGE A FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX B

Opinion Of The Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1471

LIBERTY LOBBY, INC., et al., APPELLANTS

v.

JACK ANDERSON, et al.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 81-02240)

Argued January 20, 1984

Decided November 2, 1984

Mark Lane of the Bar of the Supreme Court of New York, pro hac vice by special leave of the Court, with whom Fleming Lee was on the brief, for appellants.

Michael D. Sullivan, with whom David J. Branson and Leonard Appel were on the brief, for appellees.

Before: EDWARDS and SCALIA, Circuit Judges, and HARRIS,* District Judge of the United States District Court for the District of Columbia.

Opinion for the Court filed by Circuit Judge SCALIA.

SCALIA, Circuit Judge: Liberty Lobby, a not-for-profit corporation incorporated under the laws of the District of Columbia, and Willis Carto, its founder and treasurer, a citizen of California, brought this suit in the District Court for the District of Columbia against Bill E. Adkins, a Texas citizen, Jack Anderson, a Maryland citizen, and the Investigator Publishing Company, a corporation

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* Sitting by designation pursuant to 28 U.S.C. §292(a) (1982).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

formed under the laws of the State of Texas.[1] Their suit, founded on diversity of citizenship, 28 U.S.C. §1332 (1982), charged that the defendants had libeled them in two articles printed in the October 1981 issue of The Investigator magazine, which was published by Jack Anderson. The District Court granted summary judgment for the defendants, Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201 (D.D.C. 1983), and the plaintiffs now appeal.[2] The appeal presents issues regarding the asserted

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[1] Two other employees of the Investigator Publishing Company were also named in the original complaint, but have since been dismissed from the suit.

[2] Anderson's counterclaim, in which he claimed that he had been defamed by Liberty Lobby, and the second count of the plaintiff's complaint, asserting a conversion of Liberty Lobby's files, were both dismissed by the District Court with no appeal taken.

doctrine of a "libel-proof" plaintiff, i.e., one whose reputation has already been so damaged that further defamation can do no harm; the assertion that a pre-publication warning of falsity given by the plaintiff establishes the malice necessary to sustain judgment on behalf of a public-figure plaintiff; application of the "clear and convincing evidence" standard and the requirement of independent judicial determination of actual malice to a motion for summary judgment; and, of course, the merits consideration (under summary judgment standards) of whether the allegations were factual (as opposed to opinion), were defamatory, were false, and were made in good-faith reliance upon reputable sources.

I

Three stories published in the October 1981 issue of The Investigator are relevant to this lawsuit. The shortest of them, "America's Neo-Nazi Underground: Did Mein Kampf Spawn Yockey's Imperium, a Book Revived by Carto's Liberty Lobby?," was written by Jack Anderson and contained four of the thirty statements identified in the complaint as defamatory. That piece was an introduction to the two other articles: "Yockey: Profile of an American Hitler," telling the story of Francis Parker Yockey, a lawyer and author who took his own life in 1960, and "The Private World of Willis Carto," the source of the remainder of the statements identified as defamatory.

The "Yockey" and "Private World" articles were written by Charles Bermant, although the former appeared under the by-line of the magazine's staff writer Jon Obert, because Anderson did not like more than one piece attributed to a single author in any issue. Bermant joined Anderson's staff in March 1981, having previously worked in Anderson's office as an intern, but the story, according to the appellants, began much earlier. In November 1969, Joseph Trento and Joseph Spear published an article in True magazine entitled "How Nazi Nut Power Has Invaded Capital Hill."3/ Carto and Liberty Lobby sued True, claiming that

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3/ At oral argument, counsel for the appellees conceded that when the True article was published, Trento and Spear worked for Jack Anderson. Jan. 20, 1984 Tr. at 33-34.

the article defamed them. The lawsuit ended with a settlement under which True paid Carto a sum of money and published a favorable article about Liberty Lobby. In May 1981, Spear was working for Anderson, now as the Managing Editor[4/] of The Investigator. He assigned Bermant to investigate the Yockey and Carto stories and, plaintiffs claim, gave him drafts containing the statements made in the True article from which to work. Appellants' Brief at 29-30. Although the affidavit that Bermant filed with the district court does not list the Trento and Spear article as a source, see Bermant Affi-

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4/ In their briefs, both sides identify Spear as the magazine's managing editor, although he was listed as an associate editor on the masthead of the October 1981 issue. Regardless of title, he was in a position of authority over Bermant, also listed on the masthead as an associate editor.

davit at ¶¶8-17, the detailed appendix to the affidavit does identify it as a source, occasionally as the sole source, for some of Bermant's claims. See, e.g., Bermant Affidavit Appendix at 16-17.

Bermant conducted other research, which the district court characterized as "exhaustive" and "thorough[]." 562 F. Supp. at 206, 209. He reviewed the products of a Freedom of Information Act request, sought information about Carto and Yockey in libraries, and interviewed a number of people. One of his major sources was Robert Eringer, a freelance journalist; several of the allegedly defamatory statements were based solely on Eringer's claims. Bermant never met Eringer and his deposition recounts only one telephone

conversation with him. Eringer sent Bermant a draft of an article containing some information about Liberty Lobby. That draft has since been lost, probably "thrown away." Bermant Deposition at 71-72. Eringer never identified any of his sources to Bermant, nor did Bermant inquire. Anderson testified that it did not matter to him whether Eringer was reliable, for "[w]e did not intend to use his material." Anderson Deposition at 51. Eringer, believed at the time of the proceedings below to live in London, was not deposed for this lawsuit. Another of Bermant's major sources was William Cox, an attorney representing a plaintiff who had sued an organization related to the appellants in the

California courts.5/ Bermant interviewed Cox and also relied on the "Declaration of William Cox Regarding the Urgency of the Proceedings," a document apparently produced for the California lawsuit.

Bermant "spent . . . several days" writing first drafts of the articles, which were then edited by Obert. Bermant Affidavit at ¶17. There is evidence that several of the allegedly defamatory statements were added to the "Private World" article during the editing process. Bermant Deposition at 119. The Investigator's art department

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5/ Cox's client, Mermelstein, sued the Institute for Historical Review, an organization associated with Carto. The Institute had offered an award of $50,000 to the first person able to prove that Hitler's mass extermination of Jews had occurred. Mermelstein claimed the prize, and the Institute allegedly refused to pay.

produced several illustrations for the issue - two of which are also subjects of defamation claims.

Before the issue was published, William McGaw, editor of The Investigator, told the magazine's president that the articles were "terrible" and "ridiculous". He also viewed the illustrations and informed the art director that they "could be libelous." McGaw Affidavit at ¶¶13, 17. Also before the issue was published, the appellants delivered written notification to the appellees of those statements they thought were defamatory, without apparent effect.

The articles, analyzed in detail in Parts IV and V of this opinion, convey the message that Carto is racist, fascist, anti-Semitic, and a

neo-Nazi, and that Liberty Lobby was established to pursue his goals. The introductory article, written by Anderson over the by-line "the Editors," stated that upon Yockey's death Carto was able "to pick up the torch and fan it into a prairie fire." His strategy "[t]o capture political power" was "to put a benign face on his operation. . . . Thus Carto called his base organization Liberty Lobby." The "Private World" article was to the same effect. It asked, for example, such rhetorical questions as whether "Carto's opinions march goosesteps beyond the pale of responsible American conservatism?"; repeated such claims of others as the assertion that Carto was "the leading anti-Semite in the country"; and, in words and illustrations,

noted that Carto physically resembled and emulated the mannerisms of Hitler.

Carto and Liberty Lobby filed suit on September 15, 1981, challenging two of the illustrations and twenty-eight statements contained in the articles, including some of the statements repeated above.

II

We turn first to arguments which both parties bring forward as a means of avoiding the difficult inquiry into the issues of falsity and malice. Appellees ask us to affirm the grant of summary judgment without further ado because the appellants are, on two theories, "libel-proof." First, they claim that the reputations of Liberty Lobby and Willis Carto have been irreparably strained by prior publica-

tions. Whether these prior publications are truthful is not relevant, they assert, because the tort of libel, which redresses injury to reputation, has no application when the plaintiff, for whatever reason, has a reputation that cannot be damaged.

We are not yet ready to adopt for the law of libel the principle that 10,000 repetitions are as good as the truth. We see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth. To begin with, we cannot envision how a court would go about determining that someone's reputation had already been "irreparably" damaged - i.e., that no new reader could be reached by the freshest libel.

More important, however, no significant First Amendment values would be furthered by the rule appellees suggest, since, where a person has been widely libeled by reputable sources, the defendant's good faith reliance upon those sources provides, as we shall later discuss, a complete defense. Proving such good faith reliance (or actually, even less than that, merely preventing the plaintiff from proving the opposite by "clear and convincing evidence") is not such a burden that a prophylactic rule need be adopted sanctioning willful character-assassination so long as it is conducted on a massive scale.

The appellees' second libel-proof theory is somewhat different. They claim that the unchallenged portions of

these articles attribute to the appellants characteristics so much worse than those attributed in the challenged portions, that the latter cannot conceivably do any incremental damage. This apparently equitable theory loses most of its equity when one realizes that the reason the unchallenged portions are unchallenged may not be that they are true, but only that appellants were unable to assert that they were willfully false. In any event, the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us - or perhaps upon the pessimistic assumption that no matter

how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity. So also here. Even if some of the deficiencies of philosophy or practice which the appellees' articles are lawfully permitted to attribute to the appellants (which is not necessarily to say they are true) are in tact much more derogatory than the statements under challenge, the latter cannot be said to be harmless. Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential. ("He was a liar

and a thief, but for all that he was a good family man.")6/

None of the opinions the appellees cite - all decisions of federal courts interpreting state law in the absence of state court guidance - extend the

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6/ There may be validity to the proposition that at some point the erroneous attribution of incremental evidence of a character flaw of a particular type which is in any event amply established by the facts is not derogatory. If, for example, an individual is said to have been convicted of 35 burglaries, when the correct number is 34, it is not likely that the statement is actionable. That is so, however, not because the object of the remarks is "libel-proof," but because, since the essentially derogatory implication of the statement ("he is an habitual burglar") is correct, he has not been libeled. That issue is not presented here, both because none of the repulsive attributes which the appellees imputed to the appellants have been established or conceded to be true, and because the statements which we find to have been improperly taken from the jury impute attributes which, while less heinous than those for which the appellees have a good-faith defense, are nevertheless quite separate and distinct from them.

libel-proof doctrine as far as appellees would go. In fact, the Second Circuit, an early proponent of the doctrine, has narrowed it to the facts presented in its earlier cases. See Buckley v. Littell, 539 F.2d 882, 889 (2d Cir. 1976). Because we think it a fundamentally bad idea, we are not prepared to assume that it is the law of the District of Columbia; nor is it part of federal constitutional law.

Appellants, for their part, argue that we can dispense with inquiry into the existence of actual malice, see pages 17-25, infra, because that element of liability is automatically established (to a degree sufficient to go to the jury) by the fact that appellees proceeded with these publications despite a warning from apellants that

the articles were defamatory and a demand that they not be printed. These were allegedly contained in a letter to Jack Anderson which was "as explicit and detailed as the complaint filed in this matter," Appellants' Reply Brief at 6. It may be enough to note that that letter was not mentioned in the plaintiffs' papers in opposition to summary judgment, and is not part of the record on this appeal. Even if it were before us, however, the letter as described could not conceivably constitute, in and of itself, sufficient evidence of malice to overcome a summary judgment motion. That effect might be achieved by a prior notice citing specific, verifiable facts contradicting the allegations so directly as to cause any reasonable person to

conduct further inquiry; but mere general allegations of falsity similar to those contained in the complaint do not suffice. If the case reaches the jury, of course, such a notice can be considered as evidence of malice along with other factors - but standing alone it cannot take the case there.

III

We must address, then, whether the District Court properly granted the defendants' motion for summary judgment on the ground that all the elements of libel had not been adequately established. The nature of those elements is not in dispute, but the degree of certitude with which one of them had to be established, and the nature of the judgment that the District Court was to bring to bear upon it (i.e., indepen-

dent or deferential) will require some discussion.

Appellants do not question the District Court's ruling that they were so-called limited purpose public figures, and that the alleged libels pertained to the area in which they held this status. This means that, as a constitutional matter, in order to recover damages from these media defendants, the plaintiffs had to prove that they acted with actual malice. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). Actual malice is not simply ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true. Id. at 328. The test is not an objective one, for the Supreme Court has noted that

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added). This does not mean, of course, that actual malice cannot be proved inferentially. The plaintiff need not obtain an admission of fault from the defendant.

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation.

Id. at 732.

To prevail in a libel trial, not only must the public-figure plaintiff prove the existence of actual malice; he must prove it with "convincing clarity," New York Times v. Sullivan, supra, 376 U.S. at 285-86, or to use the Court's more recent language, with

"clear and convincing proof," Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Moreover, judges are not merely to determine whether the finder of fact could reasonably find such "convincing clarity" to exist, but are "independently [to] decide" that point, "as expositors of the Constitution." Bose Corp. v. Consumers Union, 104 S. Ct. 1949, 1965 (1984). The issue we address in this portion of our opinion is whether these requirements of "convincing clarity" and "independent judicial determination" apply at the summary judgment stage. Even though this is a diversity case, that issue is governed by federal law - either because the Constitution imposes the more demanding requirements at the summary judgment stage, or because, if it does

not, the matter is determined by the rules of the forum court under Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Anchorage-Hynning & Co. v. Moringiello, 697 F.2d 356, 360 (D.C. Cir. 1983) (applying Erie to the District of Columbia); see Schultz v. Newsweek, Inc., 668 F.2d 911, 917 (6th Cir. 1982).

With regard to the "clear and convincing evidence" requirement, the issue can be framed as follows: whether, in order to deny the defendant's motion for summary judgment, the court must conclude that a reasonable jury not only could (on the basis of the facts taken in the light most favorable to the plaintiff) find the existence of actual malice, but could find that it had been established with

"convincing clarity." We conclude that the answer is no. Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well. It would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions - marshalling for the court all the facts supporting his case, and seeking to contest as many of the defendant's facts as possible. Moreover, a "clear and convincing evidence" rule at the summary judgment stage would compel the court to be more liberal in its appli-

cation of that provision of FED. R. CIV. P. 56(e) which states that the court "may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." In other words, disposing of a summary judgment motion would rarely be the relatively quick process it is supposed to be. Finally, if summary judgment were supposed to be based on a "clear and convincing" standard, it is hard to explain the Supreme Court's statement questioning the asserted principle that in public figure libel cases "summary judgment might well be the rule rather than the exception," and affirming to the contrary that "[t]he proof of 'actual malice' . . . does not readily lend itself to summary disposition."

Hutchinson v. Proxmire, 443 U.S. 111, 120 & n.9 (1979). There is slim basis for such a statement if, in order to survive a motion for summary judgment, the plaintiff must establish an arguably "clear and convincing" case.

We believe, in short, that application of the "clear and convincing evidence" constitutional standard in public figure libel cases is similar to application of the "beyond a reasonable doubt" constitutional standard in criminal cases. There, "probable cause" is sufficient to take the case to trial, see Brown v. Department of Justice, 715 F.2d 662, 667 (D.C. Cir. 1983), and the heightened standard applies only after the government has had an opportunity to present its full case, United States v. Davis, 562 F.2d 681, 683-84 (D.C.

Cir. 1977) (on motions for acquittal, court must determine whether there is any evidence "upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt").

We realize that some other courts have expressed a different rule. See, e.g., Yiamouyiannis v. Consumers Union, 619 F.2d 932, 940 (2d Cir. 1980) ("a judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, 'a reasonable jury could find malice with convincing clarity,'" quoting Nader v. de Toledano, 408 A.2d 31, 50 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980)). These formulations were set forth, however, with no analysis of the point here discussed. In fact, the court's

attention was directed to the question of whether the normal procedural standard governing summary judgment applied (i.e., the test "could a reasonable jury find," as opposed to some test more favorable to the defendant) rather than to the question of what burden of proof that standard should be applied to. Moreover, those courts' analyses of the facts demonstrate that they rested their decisions upon lack of evidence of malice, not upon lack of "convincing clarity" in that evidence. See Yiamouyiannis v. Consumers Union, supra, 619 F.2d at 942 ("no showing has been made that they were published with actual malice, let alone a showing that achieves 'convincing clarity'"); Nader v. de Toledano, supra, 408 A.2d at 56 ("[i]n sum, . . . we agree with the

trial court that appellant has demonstrated no genuine issue of fact as to whether Copley had reason to doubt de Toledano's veracity").

With regard to the Bose requirement of independent judicial determination we reach the same conclusion, for the same compelling practical reason: it is simply incompatible with the preliminary nature of the summary judgment inquiry. If it were to be applied at that early stage, summary judgment would be converted from a search for the minimum amount of evidence that could persuade a reasonable person into the final assessment of "actual malice" by the court itself -- final, at least, if the court concludes actual malice has not been established. That would compel the plaintiff to present his

full case prematurely, with the undesirable consequences described above. In addition, courts of appeal would be burdened with the unusual task of making the largely factual determination of actual malice in many cases where a judge or jury verdict against the plaintiff would render that unnecessary.

For the foregoing reasons, we believe that the constitutional requirements of "clear and convincing" proof and independent judicial determination of the ultimate issue of actual malice are to be applied only after the plaintiff has had an opportunity to present his evidence. We thus agree with the two-stage approach set forth by Judge Wright, joined by Judge Robinson, in his concurrence in

Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.), cert. denied, 398 U.S. 940 (1970):

> Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant. . . .
>
> If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with "convincing clarity."

One further clarification is needed: In reviewing the district court's application of the foregoing

principle, we do not defer to its conclusions and reverse only if they are clearly erroneous. Since in granting or denying summary judgment a district court by defintion makes a determination of law rather than fact, we review the matter anew. Western Casualty & Surety Co. v. National Union Fire Insurance Co., 677 F.2d 789, 791 n.1 (10th Cir. 1982).

IV

A. Nondefamatory Allegations

We proceed, then, to a discussion of the merits. Preliminarily, we can eliminate from our inquiry those statements asserted to be false in the Complaint which cannot, as a matter of law, be libelous since they do not "tend[] so to harm the reputation of another as to lower him in the estima-

tion of the community or to deter third persons from associating or dealing with him," RESTATEMENT (SECOND) OF TORTS §559 (1977). The plaintiffs' challenges to the following numbered allegations represent no more than a charge of journalistic inaccuracy, which is not an actionable fault:

3. Assertion that Liberty Lobby is tax exempt.

4. Assertion that Yockey's book Imperium is "circulated only among the elect"; that Carto's admiration for Yockey is a "secret thing"; and that Carto "hides in the shadows of reclusion and anonymity."

10. Use of word "drifting" to describe Carto's movement among various right-wing

groups. (Even if this can be thought sufficiently derogatory to be actionable, it is a characterization which would qualify as an opinion and thus be protected. See Section B below.)

12. Assertion that Liberty Lobby's magazine, The Spotlight, "boasts 335,000 readers," when in fact it had a paid circulation of 335,000.

18. Description of Jeremy Horne as a veteran employee.

B. Opinions

We can also eliminate from our consideration three other allegations, which are constitutionally protected opinion, and therefore not actionable.

In Gertz v. Robert Welch, Inc., supra, the Supreme Court stated that:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

418 U.S. at 339-40. Since opinions cannot be false, they cannot be the basis of a defamation action. While it is often difficult to draw a line between statements of fact and opinion, see, e.g., Ollman v. Evans, 713 F.2d 838 (D.C. Cir. 1983), vacated, October 6, 1983, reh'g en banc, March 6, 1984, we are of the view that the following numbered allegations quality as the latter:

7. Description of Carto as seeking to "destabilize society," and to "create[] a climate of fear and danger," in order to "seize real political power."

30. Statement that Carto's appeal to "American traditions" is inconsistent with the racial, ethnic and religious equality central to the "American idea." 7/

There are no objective criteria by which the truth or falsity of these statements can be evaluated. A proposal to eliminate what one favors in the social structure is "destabliza-

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7/ To the extent other portions of this allegation contained the imputation that Carto supported racial and religious bigotry, the good-faith defense discussed below in connection with allegation 5 was applicable, see pages 22-23, infra.

tion," and to eliminate what one opposes is "progress." One man's "climate of fear and danger" is another man's "realistic assessment of the perils that confront us." The essence of the "American idea," and what is or is not consistent with it is preeminently a matter for political (i.e., opinionated) debate rather than scientific inquiry.

In our view, all of the assertions in allegation 25 except those repeated elsewhere[8/] also qualify as opinion. Since, with regard to one of the assertions, this assessment depends heavily upon context, we set forth that allegation in full.

8/ The portions of this allegation asserting anti-Semitism and adulation of Hitler are subject to the good-faith defense. See the discussion of allegations 5 and 6, pages 22-23, infra.

"In this scrutiny of Willis Carto and what he represents, five of the characteristics John Roy Carlson said identify inherent or incipient fascism have manifested themselves in greater or lesser degree. They are; [sic] a virulant anti-Semitism to dissolve the social fabric; the pitting of group against group and race against race to weaken national unity; incessant Red-baiting to smokescreen fascist propoganda [sic]; super patriotism and a perverted brand of nationalism; and the creation of a 'survivor mentality' to further fragment society. Three other characteristics are also evident in the Carto record; the use of lies and half-

> truths to win the support of the politically ignorant; adulation of Adolf Hitler; denigration of democracy and agitation for an authoritarian New Order."

What one person may consider "the pitting of group against group" another might regard as the championing of minority rights or opposition to exorbitant and divisive minority demands. What is "Red-baiting" or "superpatriotism" or "perverted nationalism" to some may seem no more than appropriate awareness of Communist subversion and love of country to others. Whether a person is creating a "survivor mentality" or merely urging sensible immediate precautions surely depends upon one's estimation of how close the world is to the brink of disaster. Whether

democracy is being "denigrated" depends upon what elements one considers central to that political form, and except to the anarchist what is "authoritarian" is necessarily a matter of political judgment and degree. As tor "fascism": Although that word has a particular meaning in political science discourse, in the arena of political commentary we are engaged in here it has long been used to describe nothing more specific than right-of-center views of which the writer disapproves.9/ See Buckley v. Littell, 539 F.2d 882, 894 (2d Cir. 1976). We have no difficulty in demoninating all

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9/ George Orwell commented on this phenomenon in 1946: "Many political words are . . . abused. The word Fascism has now no meaning except in so far as it signifies 'something not desirable.'" G. ORWELL, Politics and the English Language, in A COLLECTION OF ESSAYS 162 (1953).

of the statements relating to these terms as statements of opinion.

The statement that Carto's record was characterized by "the use of lies and half truths" is more problematic, but we are of the view that in this context it constitutes a statement of opinion as well. The assertion that a person has "lied" in the sense of intentionally making a misrepresentation of fact is unquestionably defamatory. See 50 Am. Jur. 2d Libel and Slander §89 (1970). It seems to us, however, that when a charge of unspecified "lies and half truths" is made in the midst of a paragraph making such opinionated indictments as "fascism," "Red-baiting," "perverted nationalism," and "denigration of democracy," the reader would not be justified in believing

that the misrepresentations referred to are distortions of demonstrable fact rather than distortions of similar political assessments which the opinionated writer takes to be as unquestionable as fact - for example (to hypothesize a few that would fit in nicely with the rhetoric of this case), whether the Communist world intends to "bury us," or whether Adolph Hitler saved Europe from Communism. This interpretation is suggested not merely by the statements with which the charge of "lies and half truths" is surrounded, but also by the fact that the asserted purpose of the "lies and half truths" is to "win the support of the politically ignorant" (emphasis added), rather than "to deceive the unin-

formed." As recently stated by an Illinois court:

> The allegation that a public figure is a "liar" can be seen as a factual assertion unprotected by absolute privilege when the derogatory remark is laden with factual content, as opposed to mere name-calling.

Costello v. Capital Cities Media, Inc., 111 Ill. App. 3d 1009, ____, 445 N.E.2d 13, 18 (1982). In the present case the alternative to factual content is not name-calling, but rather political opinion - and we think it is with the latter that the remarks were laden. We emphasize it is not our holding that specific factual assertions are immunized from defamation liability by accompanying political rhetoric; but

that the politically rhetorical context of vague and ambiguous assertions (Carto uses "lies and half-truths") can determine their meaning as opinion rather than fact.

C. Allegations Unaccompanied by Evidence of Malice

As to those challenged statements that could be defamatory, and were factual, appellees' defense was based not upon truth of the assertions but upon good-faith reliance on reputable sources. It established, that unquestionably eliminates the necessary element of actual malice. Inquiry into the question, however, cannot be conducted in gross. It is the individual allegedly libelous statement (taken in its proper context) rather than the accuracy of the publication as a whole,

which is on trial. A falsehood published with actual malice is no less actionable for being surrounded by an array of well documented and carefully researched allegations. The accompanying truth cannot eliminate the libel, and is indeed the most effective means of increasing its harm by increasing its credibility. The district court appears to have acknowledged this principle, since it found that "the information contained within [Bermant's] sources substantiates each allegation contained in the articles," 562 F. Supp. at 209.

We turn first to the two remaining statements (not already disposed of as nonlibelous in our earlier discussion) contained in the introductory article. That article was written in its en-

tirety by Anderson, rather than Bermant - so that Bermant's affidavit setting forth published sources that "I relied upon" for these statements cannot be regarded as demonstrating good-faith reliance of the author. It is true that the Appendix to the Bermant affidavit states, unlike the body of the affidavit, that it sets forth the authorities upon which "defendants" (rather than "I") relied - but in view of the contradictory statement in the body of the affidavit, that is not a sufficiently clear allegation that Anderson relied upon these authorities to sustain summary judgment. Indeed, it is questionable whether the second-hand assertion of Bermant as to what was in Anderson's mind would meet the requirement of FED. R. CIV. P. 56(e)

that affidavits "be made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein."

Nonetheless, in light of the manner in which, according to uncontroverted evidence, the Anderson introduction was written, we think no reasonable jury could find that Anderson personally acted with actual malice with regard to statements whose defamatory content does not go beyond statements made by Bermant in one of the last two articles. Bermant's deposition stated that "he [Anderson] was given finished drafts of both [the second and third] pieces and took certain facts and quotes out and . . .

based on or coupled with his own knowledge and his own background, wrote the introduction." Bermant Deposition at 97. Anderson's deposition (at 107) stated that in preparing the introduction "I had no independent information. I based it on the information in front of me so I was relying . . . on the reporters who work for us. . . . I took material either from the two articles or asked someone else to prepare a bridge which I disliked and then rewrote." Anderson was entitled to rely upon Bermant's research, unless he had reason to doubt Bermant's accuracy. No such reason was presented by the record here.10/

10/ Even if there was evidence indicating that Anderson knew of the True libel suit, see note 3, supra, nothing suggests that he thought Bermant was relying exclusively upon the True article
(footnote continued)

As it happens, both of the remaining defamations attributed to the Anderson article are reformulations of Bermant's allegations, some of which are challenged here and some of which are not. Both the reference to "American's neo-Nazi underground" (allegation 1) and the reference to "a more sinister neo-Nazi cabal, men of influence and cunning, lurk[ing] in the shadows" (allegation 2) find support in such assertions made by the "Private World" and "Yockey" articles as the assertion that "Carto [was] a Hitler fan" and "Liberty Lobby was 'infiltrated by Nazis who revere the memory of Hitler'" (allegation 6); and the assertion that the admirers of Yockey's

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(footnote continued from previous page) as a source for these allegations - as in fact Bermant was not.

book Imperium, among whom Carto is identified, constitute "a neo-Nazi underground," whose members "control a publishing-propaganda network stretching to the far corners of America" (unchallenged assertion). Allegations 1 and 2, therefore, are nonactionable on the basis of Anderson's actual malice. Whether they are actionable under the doctrine of respondeat superior against Anderson or any other defendant, on the basis of Bermant's actual malice, see Gertz v. Robert Welch, Inc., 680 F.2d 527, 539 n.19 (7th Cir. 1982), cert. denied, 459 U.S. 1226 (1983), depends upon the outcome of our inquiry into Bermant's good faith reliance on other sources, particularly

with regard to allegations 6 and 9, as discussed below.11/

We turn, then, to the remaining statements in Bermant's articles, to determine whether, as to each, the trial court's finding of exculpating reliance upon reputable sources was

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11/ The judgment of the District Court was based exclusively upon absence of malice on the part of any defendant. We have not been asked to consider, nor do we express any opinion upon, the principal-agent relationship among the various defendants. The precise relationship between Anderson and Bermant, for example, is unclear. Compare Anderson Deposition at 42 ("Q: Was [Bermant] . . . an employee of yours or of Jack Anderson Enterprises? A: No.") with Bermant Deposition at 9 ("Q: Who pays you for your work? In other words, who signs the checks? A: Jack Anderson.").

In the District of Columbia an employer can be held liable for torts committed by employees acting within the scope of their employment. See Jordan v. Medley, 711 F.2d 211, 213 (D.C. Cir. 1983); Smith v. District of Columbia, 399 A.2d 213, 215 n.3, 221-22 (D.C. 1979) (slander case); RESTATEMENT (SECOND) OF AGENCY §247 (1958).

correct. The plaintiffs' theory is that some of the defendants' sources were inherently unreliable, and since a jury can infer that Bermant was aware of this fact, Bermant's protestations that he had no malicious intent are insufficient to support summary judgment.12/

12/ For a discussion of the inconclusiveness of "self-serving, albeit plausible" affidavit statements regarding intent, see Stewart v. Credit Bureau, Inc., 734 F.2d 47, 54-55 (D.C. Cir. 1984). There, although the affidavit was "uncontested," we held that because the record "manifest[ed] enough possibility" that the self-serving affidavit statement was incorrect the court properly did not conclude its inquiry with the affidavit, but instead permitted the matter to be explored at trial. Likewise here, Bermant's assertion that he acted without actual malice does not end our inquiry. There is no inconsistency in our accepting, for purposes of the summary judgment decision, Bermant's self-serving statements as to the sources he relied upon. The fact that he relied upon a concededly existing source is not at all likely to be disproved by circumstantial evidence,

(footnote continued)

We find that summary judgment was proper for those statements which Bermant could show were based on reports previously published in reputable sources. Many of the claims contained in The Investigator's stories were not new. They had been made in previous articles about Carto and the Liberty Lobby. Bermant's sworn statement claimed that he relied on these published sources, and the appellants' evidence did not dispute that. Since the plaintiffs adduced nothing that would permit a jury to conclude that Bermant had reason to doubt these published sources and had therefore acted with actual malice, we think summary

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(footnote continued from previous page) whereas the fact that he believed what the source said is - for example, by evidence that many other sources which he must have been aware of said the opposite.

judgment was appropriate. The following numbered allegations are in this category.

5. Allegation that Carto is "the leading anti-Semite in the country." Many published sources, from Anti-Defamation League publications to The National Review, claimed Carto and Liberty Lobby are anti-Semitic. (The prominence of Carto in this regard - whether he is "the leading anti-Semite" - is, if derogatory apart from the anti-Semitism itself, a matter of opinion.)

6. Reference to Carto as a "Hitler fan" and assertions that Liberty Lobby was "infil-

trated by Nazis." A prior Drew Pearson publication referred to Liberty Lobby as "a nest of Nazis"; a statement by Rep. Eilberg in the Congressional Record and the Cox Declaration in the Mermelstein lawsuit described Carto's admiration of Hitler.13/

13/ Appellants assert that the unreliability of Cox and therefore the malice of Bermant follows automatically from the fact that Cox had been involved in a lawsuit against Liberty Lobby. We do not agree. It is assuredly not the case that every journalistic reliance upon the version of a story given by one of the protagonists demonstrates malice. The Cox assertions relied on here (see, in addition to the present allegation, allegations 20 and 21, infra) were directly supported by at least one other (impartial) source, and were given plausibility by allegations of neo-Nazism and anti-Semitism from many other sources.

8. Allegation of anti-Semitism. See allegation 5.

9. Neo-fascist [Yockey] as Carto's role model. Carto's introduction to Imperium adequately supports the claim that Yockey was Carto's role model, inasmuch as the defamatory content of that claim (if any) consists of the implication that Carto admired Yockey's ideas: "I was in the presence of a great force. . . . [W]e understood that I [Carto] would not desert him." The claim that Yockey was a "neo-fascist" was supported by several publications, and is in any case opinion, see page 17, supra.

16. Allegation of anti-Semitism. See allegation 5.

20. Purpose of establishing the Institute for Historical Review was to disprove Hitler's mass extermination of Jews. This was supported in substance by an article in the Long Beach Press-Telegram and by the Cox declaration filed in the Mermelstein lawsuit.

21. Details of Mermelstein-Institute for Historical Review lawsuit. This was supported by the Cox declaration filed in a lawsuit, and by a Los Angeles Times story about the controversy.

26. Attribution to Spotlight of the term "'Jew-Zionist' inter-

national bankers." The derogatory content was sufficiently supported by (1) numerous published allegations of anti-Semitism, see allegation 5, and (2) Spotlight's claim that the energy crisis was the result of "Israel in cahoots with the multinational corporations."

28. Allegation that a fine was levied against Liberty Lobby by the FEC. This was supported by an article in Spotlight.

We also find that summary judgment was proper for those statements which Bermant's affidavit asserted were based on unpublished interviews with Robert Bartell and Irving Suall, specifically the following:

22. Statement that Carto, "outraged over whistle blowing," required employees to submit to lie detector tests as a condition of employment, attributed to Robert Bartell, Chairman of Liberty Lobby's Board of Policy.

24. Statement that a plan, called "Operation Survival," was a plan to establish a dictatorship, attributed to ADL official Irving Suall.

Each of the individuals occupied a position or engaged in activities which made it reasonable to believe that he was knowledgeable concerning the matters relating to Liberty Lobby or Carto to which the attributed statement pertains. Each, moreover, was available

(and ample time was provided) for deposition by plaintiffs which could establish that the interview had not occurred, that the statement had not been made, or that the subject of the interview could not reasonably have been thought to be a reliable source. In these circumstances we do not believe that the plaintiffs' mere general assertion that these statements were false and were maliciously published suffices to overcome the good-faith defense established by Bermant's affidavit.

V

The district court was correct in entering summary judgment in favor of the appellees on the foregoing twenty-one allegations, and we affirm its findings. As to each of them, one

element of the cause of action - either defamatory content, factual nature or malice - is absent.14/ Our examination of the record, however, reveals that a jury could reasonably conclude that the nine remaining allegations were defamatory, false, and made with actual malice. As to these claims, then, we must reverse and remand to the district court. See J. MOORE & J. WICKER, 6 Pt. 2 MOORE'S FEDERAL PRACTICE ¶56.27[1] at p. 56-1560 (2d ed. 1982) (remand for limited issues in dispute proper).

14/ We have not discussed separately the contention that the juxtaposition of an article entitled "The Private World of Willis Carto" to an article about an alleged "American Hitler" (to wit, Yockey) is defamatory. In light of what we have found regarding the nonactionability of allegations regarding Carto's admiration of Hitler, see discussion of allegation 6 at page 23, supra, and also Carto's acknowledged admiration of Yockey, see discussion of allegation 4 at page 15, supra, there is no substance to this claim.

See, e.g., McBride v. Merrell Dow and Pharmaceuticals, Inc., 717 F.2d 1460 (D.C. Cir. 1983).

Allegation 11 asserts that Liberty Lobby occupies a building in Washington, D.C., owned by the Government Educational Foundation, "[t]he chairman and owner of [which] is Willis Carto, who bought the building with money contributed by many of Liberty Lobby's members in response to an urgent appeal"; and that Liberty Lobby pays the Government Educational Foundation $6,000 per month rent. The implication is that Carto is deriving personal profit from an excessive rental to Liberty Lobby. The plaintiffs deny all elements of the allegation, asserting that the building is not owned by the Government Educational Foundation, that

Carto is neither chairman nor owner of that organization, and that Liberty Lobby pays no rent for the building. The sources allegedly relied upon by Bermant (other than Eringer, whose reliability for purposes of the good-faith defense is inadequate, as we shall discuss below) do not assert ownership of the Foundation by Carto or the payment of any rent, much less a specific figure of $6,000. It is for a jury to determine the truth or falsity of these matters and whether, if false, they are defamatory. On the basis of evidence adduced at this stage, it is impossible to say that no actual malice could be found.

Allegation 15, in addition to once more characterizing Carto's movement among various right-wing groups as

"drifting" (a statement we have disposed of in the context of another allegation earlier, see page 15, supra), asserted that Carto "organized and promoted the Joint Council for Repatriation. What he meant by 'repatriation' was the forced deportation of all blacks to Africa." The published sources relied upon by defendants support the assertion that Carto created this organization, and that its purpose was to "send[] American blacks back to Africa." They do not establish, however, that the proposal envisioned "forced deportation" - in fact, to the contrary, one of them asserted that Carto (overtly at least) only sought "voluntary" repatriation. While the latter detail reduces not at all the repugnant racism of the scheme,

it is possible to be a racist without being guilty of the quite separate fault of advocating the forced deportation of United States citizens. It is the distinction between the actions of White Citizen Councils, during the worst days of the civil rights struggle, in subsidizing bus fares for blacks willing to emigrate from the South, and the action of groups such as the Klu Klux Klan in driving blacks out by physical force. As far as racism is concerned, there is no distinction between the two, but the latter contains an additional and quite distinct repugnancy. Since the published sources referred to by the defendants not only do not establish this point but to the contrary assert that Carto's scheme was formally for "voluntary"

repatriation, we think it is a jury question whether this allegation, if false, was made with actual malice.

We find that a jury could reasonably conclude that defamatory statements based wholly on the True article were made with actual malice. That article was the subject of a prior defamation action which was settled to Carto's satisfaction, a fact likely known to Bermant's editors, if not Bermant. Whether the particular statements relied on were false and whether the appellees were actually aware of that falsity are matters for a jury to determine. Allegation 19, the illustration suggesting that Carto emulated Hitler, and allegation 29, that Carto joined the singing of "Hitler's 'Horst Wessel Lied'" and delivered a speech in

an attempt to emulate Hitler's style and charisma, were based solely on the True article. There is no other evidence that Carto emulates Hitler in appearance or in action, allegations the jury could find to be defamatory.

We turn next to the five allegations based solely upon the conversation with Robert Eringer:

13. Statement that Carto "conducts his business by way of conference calls from a public telephone," which arguably suggests criminality;

14. Claim that in 1968 a Carto front organization "used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York" (since Liddy was later con-

victed of felony in connection with political activities, the allegation could be considered defamatory);

17. Illustration showing Carto secretly observing prospective employees through a one-way mirror;

23. One-way mirror allegation, in text;

27. Claim that a lead story in an issue of The Spotlight was a total hoax.

We find that a jury could reasonably conclude that Bermant made these allegations with a disregard for their truth or falsity that constituted actual malice. For one thing, there is only Bermant's word for the fact that Eringer ever said anything that sup-

ports the statements. The same was true for the statements, discussed earlier, attributed to Bartell and Suall - but as we noted, see pages 24-25, supra, those individuals were present at known locations in this country and could have been deposed by the plaintiffs, whereas the mysterious Mr. Eringer was thought to be somewhere in England. Moreover, Bermant's dealings with Eringer display a much lesser degree of care, despite the scurrilous allegations for which he is the sole source. Bermant not only did not inquire how Eringer came to know these details of Carto's operations; he never even looked the unknown Eringer in the eye until after the story was published, but spoke to him only once over the telephone. Anderson admits that he

did not care whether Eringer was reliable. These actions came close to the hypothetical case of actual malice the Supreme Court described in St. Amant: a story "based wholly on an unverified anonymous telephone call." 390 U.S. at 732. Eringer was identified by name, but he was in all other respects unknown to the appellees. These allegations, which defendants claim were based solely on Eringer's assertions, should have gone to the jury.

* * * * *

We affirm the District Court's grant of summary judgment as to all claims of defamation except those addressed in Part V of this opinion. As to the latter, we reverse and remand for further proceedings consistent with this opinion.

So ordered.

APPENDIX C

Opinion of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC., et al., Plaintiffs,

Civil Action No. 81-2240

v.

JACK ANDERSON, et al., Defendants.

MEMORANDUM OPINION

Appearances:

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Before

Barrington D. Parker
United States District Judge

Entered: March 31, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC., et al.,	:	
Plaintiffs,	:	Civil Action
v.	:	No. 81-2240
JACK ANDERSON, et al.,	:	
Defendants.	:	

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

In this action the defendants, who are engaged in the publishing business, were responsible for publishing state-

ments that the plaintiffs were neo-Nazi, fascist, anti-Semitic, and racist. The plaintiffs' complaint alleges that the statements were false and derogatory, and they seek general and punitive damages. The defendants have moved for summary judgment on the grounds that the plaintiffs are public figures, that there is no evidence of actual malice, and that the plaintiffs are libel-proof.

The parties' memoranda of law, the several affidavits, and the entire record have been considered. The Court determines as a matter of law that the defendants are entitled to summary judgment and that the libel complaint should be dismissed. The reasons for this conclusion are set out in the discussion which follows.

A second count of the complaint charges that in 1966 the defendant Jack

Anderson took possession and control of and converted to his use certain property -- files -- of the plaintiffs. This count is also subject to a motion for summary judgment. The motion is likewise granted.1/

BACKGROUND

While it is claimed that there are numerous disputed facts in this libel suit, many are of limited, if any, consequence. The material underlying facts necessary for disposition of this motion for summary judgment are uncontested and set out below.

Liberty Lobby is a not-for-profit corporation headquartered in the District of Columbia. Plaintiff Willis A. Carto is its founder, treasurer and its chief lobbyist. Liberty Lobby "is the

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1/ The motion is discussed, infra, pp. 14-15.

first citizens' lobby in the United States," with an avowed purpose to advocate and promote "patriotism, nationalism, lawfulness, protection of the national interests of the United States and the economic interests of its citizens, and strict adherence to the United States Constitution and the form of government it establishes."2/ To disseminate its views, Liberty Lobby publishes a weekly national newspaper, The Spotlight, with more than 335,000 paid subscribers and an even greater number of readers. A daily radio commentary, "This is Liberty Lobby," is carried over 460 stations, and a weekly half-hour television news show is broadcast on 30 stations.

The two articles giving rise to this libel suit were published in the

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2/ Complaint at ¶12.

October 1981 issue of The Investigator, a magazine published by defendant Investigator Publishing Company. Defendant Jack Anderson was publisher of the magazine; defendant Bill E. Adkins was the president and chief executive officer of the Investigator Publishing Company. The Investigator has since ceased publication.

The two articles, entitled "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler," were authored by Charles Bermant, an employee of the defendants, and edited by Jack Anderson. The articles were introduced by a section signed by "The Editors": "Did Mein Kampf Spawn Yockey's Imperium, a Book Revived by Carto's Liberty Lobby?" The publications recount the history of Carto and Liberty Lobby, and convey statements

expressed by many organizations and individuals describing Carto and Liberty Lobby's views. Without doubt, the plaintiffs are referred to as neo-Nazi, fascist, anti-Semitic and racist. The portrayals form the basis for plaintiffs' libel complaint.

To support their motion for summary judgment, the defendants submitted the affidavit of Charles Bermant.3/ His affidavit details the investigative means he utilized in his research before writing the articles. He rebuts, point by point, each of the plaintiffs' allegations of libel, and reveals the sources he relied upon in composing each of the allegedly libelous statements. In preparing for the articles, Bermant secured more than 1000 pages of documents from the federal government

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3/ Affidavit of Charles Bermant, filed August 19, 1982.

under the Freedom of Information Act, 5 U.S.C. §552 et seq. He collected newspaper articles and press clippings published by The Washington Post, The Washington Star, The Los Angeles Times, William Buckley's National Review, True Magazine, and the Anti-Defamation League of B'nai B'rith. Statements by congressmen reported in the Congressional Record were also relied upon. Several examples from the sources uncovered by Bermant are illustrative:

> An outspoken anti-Semite who has professed an abiding admiration for Hitler and Nazi Germany and has been the moving force behind a network of Jew-hating organizations and publications over the years is also the unpublicized force behind "This is Liberty Lobby," an extremist radio program carried

five times a week by some 126 stations around the country.

His name is Willis A. Carto.

. . .

Years ago, Carto wrote to a fellow rightist, Norris Holt: "Hitler's defeat was the defeat of Europe. And America. . . . The blame must be laid at the door of the international Jews."

120 Cong. Rec. E4841 (daily ed., July 18, 1974) (remarks of Rep. Eilberg).4/

"Carto wants a nationalistic socialist dictatorship" in the United States, a former Liberty Lobby executive told a reporter.

Chandler, "'Debunkers' of Holocaust Linked to Right-Wing Extremists," Los Angeles Times, May 3, 1981.5/

4/ Id., appendix at 31.

5/ Id., appendix at 4, 32.

> "The revolutionists have seen to it," Carto wrote the racist author Earnest Sevier Cox in 1955, "that only a few Americans are concerned about the inevitable niggerfication of America." But Carto had a plan, for a "flank attack." He established, and promoted secretly the Joint Council for Repatriation--a send-'em back-to-Africa movement with an added benefit: ". . . such a movement would be the strongest blow against the power of organized Jewry that can be imagined."

Simonds, "The Strange Story of Willis Carto," National Review, September 10, 1971, at 979.6/

Bermant also relied upon information from William Cox, a California

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6/ Id., appendix at 14.

attorney, who had represented a client in litigation against the Institute for Historical Review, an organization established by Carto. Cox brought suit in connection with an offer of $50,000 made by the Institute to anyone who could prove whether the death of six million Jews in the Holocaust ever took place.

Bermant even approached Liberty Lobby and interviewed Robert M. Bartell, Chairman of Liberty Lobby's Board of Policy. He tried repeatedly to obtain an interview with Carto. Such efforts were not successful.

Another source relied upon was the book Imperium, written by Francis Parker Yockey and currently advertised and sold by Liberty Lobby. In 1960, Yockey was imprisoned on charges of passport fraud and assaulting a police officer. While in jail he committed suicide, but not

before Carto succeeded in meeting with him. Impressed by that jailhouse encounter, Carto later wrote in a 35-page introduction to Yockey's Imperium: "I knew I was in the presence of a great force, and could feel History standing beside me."7/ As understated in the complaint, Carto "has never made secret his admiration for Yockey,"8/ That admiration was for a man who, in his book Imperium, wrote:

> The Jew is a product of another Culture. . . . This basic fact kept the Jew entirely separate from the West spiritually and racially -- the West rejected his world-feeling, he rejected its. Mutual hatred and mutual persecution only strengthened the Jewish race,

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7/ Id., appendix at 10, quoting from Carto's introduction to Imperium.

8/ Complaint at ¶14(IV).

> sharpened its cunning and increased its resentment.9/
>
> Thus, the Negro in general rejects the white race, and the white race rejects the Negro. The culture barrier is also present, for the Negro is below our culture even though he has lived within its area for centuries.10/

Based on these and a number of other sources more fully quoted in Bermant's affidavit, the defendants have moved for summary judgment. They claim that Liberty Lobby and Carto are public figures who must prove, by clear and convincing evidence, actual malice on the part of the defendants. They further assert that summary judgment is

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9/ Affidavit of Bermant at ¶22, quoting Imperium at pp. 311-12.

10/ Affidavit of Bermant at ¶22, quoting Imperium at 313.

appropriate because malice is lacking as a matter of law, since Bermant reasonably relied on the fruits of his exhaustive investigation and the host of prior reports regarding Liberty Lobby and Carto.11/

The plaintiffs disagree, arguing that an issue of fact remains concerning the absence of malice, which of necessity precludes summary judgment. They point to numerous inaccuracies in Bermant's sources, and claim that many of those relied upon by him were patently unreliable. As an example, they point to a magazine article in True which Bermant utilized. That article

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11/ In addition, defendants maintain that Liberty Lobby and Carto are "libel-proof," since the challenged portions of the articles could not harm the reputations of Liberty Lobby and Carto in any way beyond the harm already caused by the remaining, unchallenged portions of the articles. See note 12, infra.

was also the subject of a libel suit, which was settled when True agreed to pay a certain sum of money and to publish a subsequent article in True written to Liberty Lobby's specifications. Despite that settlement, Bermant relied upon the initial article in True. Liberty Lobby and Carto also assert that the defendants failed to verify their sources or take appropriate measures to ascertain the truth of the material in the articles, and that some sources, such as William Cox, were obviously biased. Further, they claim that the defendants avoided publication of non-derogatory statements from other sources when such statements contradicted the negative statements contained in the articles. All of this, in plaintiffs' view, creates issues of fact with regard to the existence of malice, and merits a

denial of defendants' motion for summary judgment.

The Bermant affidavit serves as a supporting arch to the defendants' motion for summary judgment. The plaintiffs moved to strike certain parts of the affidavit and all appendices, claiming that the portions objected to failed to satisfy and measure up to the requirements of Rule 56(e), Fed. R. Civ. P. In a Memorandum Order of March 30, 1982, the motion was found to be without merit and was denied.

ANALYSIS

The Libel Claim

1. Public Figures

Defendants argue that since plaintiffs are "limited-purpose public figures," they must therefore prove actual malice by "clear and convincing proof" in order to prevail. The issue of

whether the plaintiffs are public figures presents a question of law to be decided by the Court. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1293 n.12 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980).

In New York Times v. Sullivan, 376 U.S. 254 (1964), the Supreme Court held that the First and Fourteenth Amendments require a public official to prove the existence of actual malice to prevail in a libel suit. A lesser standard would negate the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." Id. at 270. In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), that principle was extended beyond public officials to embrace public figures, defined in either of two ways:

> [The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The second category of public figure, the individual who "voluntarily injects himself . . . into a particular public controversy," is often referred to as a public figure for limited purposes.

> [A] person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.

Waldbaum, 627 F.2d at 1292.

Defendants claim that the plaintiffs constitute "limited-purpose public figures," and therefore bear the heavy burden of proving actual malice. Plaintiffs, in a half-page argument devoid of citations, disagree. The Court agrees with the defendants, and rules that, because Liberty Lobby and Carto are "limited-purpose public figures," the burden is theirs to prove actual malice by "clear and convincing proof." Gertz,

418 U.S. at 342. Both plaintiffs have attempted to affect the resolution of public disputes having widespread ramifications. That conclusion is evident from their confessed purpose of promoting "patriotism, nationalism, lawfulness, protection of the national interests . . . and strict adherence to the United States Constitution. . . ." To effectuate those purposes, Liberty Lobby publishes a newspaper, and broadcasts its radio commentary and television news show. As its very name implies, Liberty Lobby is concerned with influencing matters of public interest. "The express purposes and the admitted activities of Liberty Lobby -- political lobbying and dissemination of information on highly controversial subjects -- render its affairs a matter of public interest." Liberty Lobby,

Inc. v. Pearson, 390 F.2d 484, 491 (D.C. Cir. 1968) (Burger, J.). As lobbyists, both Carto and Liberty Lobby are "limited-purpose public figures." See Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196 (8th Cir. 1966) (Blackmun, J.), cert. denied, 388 U.S. 909 (1967). The fact that Liberty Lobby is a corporation rather than a person does not warrant a different conclusion. See, e.g., Gospel Spreading Church v. Johnson Publishing Co., 454 F.2d 1050, 1051 (D.C. Cir. 1971).

2. Actual Malice

In proving actual malice, a public figure must show that the allegedly libelous statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, 376 U.S. at 279-80.

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published; or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added).

Because malice requires "that the defendant in fact entertained serious doubts," failure to check the reliability of a source is not sufficient to indicate the presence of malice, unless there was an obvious reason to doubt the source's veracity. See id. at 732. In

New York Times v. Sullivan, no malice was found, despite the fact that there were news stories in the files of the newspaper which, if checked, would have revealed the falsity of the allegedly libelous advertisement. The failure to discover those news stories constituted, at most, negligence, not malice. 376 U.S. at 287-88. "[M]ere proof of failure to investigate without more, cannot establish reckless disregard for the truth." Gertz, 419 U.S. at 332. More specifically,

> [while] verification of the facts remains an important reporting standard, a reporter, without "a high degree of awareness of their probable falsity," may rely on statements made by a single source even though they reflect only one side of the story without fear of

libel prosecution by a public official.

New York Times v. Connor, 365 F.2d 567, 576 (5th Cir. 1966).

If lack of investigation does not constitute malice, it follows a fortiori that a plaintiff cannot succeed in proving malice when the defendant has conducted a thorough investigation, and uncovered a host of articles published in a variety of widely circulated newspapers and periodicals. Even if all the statements contained in those sources proved false or one-sided, a reporter relying upon them in writing a story would not have "in fact entertained serious doubts as to the truth of his publication." "The subjective awareness of probable falsity required by St. Amants v. Thompson [sic]. . . cannot be found where, as

here, the publisher's allegations are supported by a multitude of previous reports upon which the publisher reasonably relied." Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 862 (5th Cir. 1978). For that reason, the court in Rosanova affirmed the district court's granting of summary judgment.

Because Bermant thoroughly investigated and researched the articles, the plaintiffs cannot prove the existence of malice, and therefore defendants' motion for summary judgment should be granted. Bermant's reliance upon numerous sources -- The Washington Post, The Washington Star, The Los Angeles Times, National Review, True Magazine, the Congressional Record, Imperium, press releases of the Anti-Defamation League, as well as the several individuals interviewed -- negates a finding of malice. The Court,

in examining the affidavit of Bermant, finds that as matter of law the information contained within these sources substantiates each allegation contained in the articles. That some of the assertions in the defendants' articles may be based on one-sided sources or that isolated statements may prove false, does not create a factual issue as to malice, especially in light of defendants' finely etched effort presenting in careful detail the journalistic research underlying each statement.

This conclusion is reinforced by the reality that plaintiffs manage to attack only a small proportion of the sources that defendants relied upon. Thus, even granting the patent unreliability of the article in True Magazine (because of the earlier libel suit), or

of William Cox (because of his position as attorney representing a client who sued the Institute for Historical Research), or of any of the other contested sources, there still remains sufficient support for the assertions made in defendants' articles to negate a finding of malice. It was not for naught that the District of Columbia Circuit spoke of Liberty Lobby's reprehensible "overtones of anti-Semitism ad [sic] racism." Liberty Lobby, Inc. v. Pearson, 390 F.2d at 491 n.7.12/

12/ In view of this Opinion, the Court need not pass on defendants' contention that Carto and Liberty Lobby are "libel-proof." See, e.g., Simmons Ford, Inc. v. Consumers Union of the United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981). Libel-proof plaintiffs are those whose reputations are so besmirched, either from uncontested portions of the allegedly libelous publication or from other events occurring prior to the challenged publication, that as a matter of law such plaintiffs would be unable to recover for further damage to reputation.

(footnote continued)

In Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.), cert. denied, 398 U.S. 940 (1970), Judge Wright of our Circuit Court noted in a concurring opinion:

(footnote continued from previous page)

A second issue that need not be decided by this Court has to do with the proper choice of law. Both sides to this suit, in repeatedly citing Nader v. de Toledano, 408 A.2d 31 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980), seem to assume that the law of the District of Columbia applies. However, at least with regard to Carto, a resident of California, it is possible that California law applies. Under Restatement 2d, Conflict of Laws §150(2), in multi-state defamation cases the applicable law is usually that of the state where plaintiff was domiciled at time of publication, if publication occurred within that state. If California law were applicable, it might severely burden Carto's ability to recover anything more than nominal damages. Under California Civil Code §48a, a plaintiff alleging libel in a newspaper may recover only special damages -- i.e., damages resulting from loss in business or occupation, but not damages arising from loss of reputation, nor punitive damages -- unless plaintiff seeks, in writing, a retraction within 20 days of publication.

> New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the Times test of actual knowledge or reckless disregard for the truth. . . . Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant. (Citations omitted.)

Because the plaintiffs are unable to prove actual malice, the defendants are entitled to summary judgment on the libel claim.

The Conversion Claim

The defendant Jack Anderson asserts that plaintiffs' claim of conversion is

time barred and that plaintiffs cannot rely on the fraudulent concealment doctrine to toll the statute of limitations. In their brief in opposition, the plaintiffs fail to make any argument to the contrary. Under Local Rule 1-9(d), the Court may thus treat Anderson's motion for summary judgment on count two as conceded.

The Anderson motion, however, has merit. The alleged conversion took place in 1966. D.C. Code §12-301(2) provides for a three-year statute of limitations. Plaintiff knew or should have known of the theft of the files since 1969, when the first article in True Magazine mentioned the theft. Carto was familiar with the contents of the article, as revealed by his filing of the subsequent libel suit against the

article's authors and publisher in 1970.13/

Based on the foregoing, the defendants' motion for summary judgment is granted as to the entire complaint. An appropriate order follows.

Entered: March 31st, 1985

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

13/ See Affidavit of Willis A. Carto in Support of Plaintiffs' Opposition to Motion for Summary Judgmert at ¶7, filed October 12, 1982.

APPENDIX D

AFFIDAVIT OF CHARLES BERMANT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC., WILLIS A. CARTO,	:	
Plaintiffs,	:	Civil Action No.
vs.	:	81-2240
JACK ANDERSON, THE INVESTIGATOR PUBLISHING COMPANY, BILL E. ADKINS, WILLIAM C. McGAW, and JAY J. ARMES,	:	Judge Parker
Defendants.	:	

District of Columbia) ss.:

AFFIDAVIT OF CHARLES BERMANT

1. My place of residence is 5415 Connecticut Avenue, N.W., Washington,

D.C. I am a reporter for Jack Anderson Enterprises and was Associate Editor for Investigative Reporter (Investigator) magazine. The Investigator has ceased publication.

BACKGROUND AND EXPERIENCE

2. I graduated from Boston University, School of Public Communication, in May 1977 with a degree in Journalism.

3. While in college I contributed articles to the college newspaper and I also freelanced articles to The Washington Post, The Albuquerque Journal, Sounds Magazine and other publications.

4. In October, 1977 I began employment as a General Assignment Reporter/Photographer on The Rio Grande Sun in Espanola, New Mexico. I worked there as a reported for one year.

5. In October, 1978, I was hired as a reporter and special sections editor at the Carlsbad Current-Argus in Carlsbad, New Mexico. I worked on that paper for one year.

6. From October 1979 to November 1980 I worked as a freelance writer in Phoenix, Arizona and Albuquerque, New Mexico.

7. I joined Jack Anderson's staff as an intern in November 1980 and was promoted to full staff in March 1981. I was assigned editorial duties for the new magazine and for the daily column.

THE CARTO/YOCKEY STORIES

8. In early May, 1981, The Investigator's Managing Editor, Joe Spear, gave me a copy of Yockey's "Imperium" and said that Yockey and Carto would be the subject of articles in the magazine.

He said that I would be assigned to work on the story.

9. The first step I took on this story was to file FOIA requests about Yockey with several government agencies. I began gathering published material about Willis Carto, Liberty Lobby and F. P. Yockey. In doing this, I visited the the D.C. Public Library, the Library of Congress, the library of The Washington Post, our own office files, and other places in Washington. I also received materials from the San Francisco Chronicle.

10. I received the FOIA information about F. P. Yockey, some 1,200 pages of documents and newspaper clippings. I pored over them and the other documentary material I gathered. I then began to interview people, some over the

telephone and some in person. I interviewed, inter alia, Helmuth Krave, Joseph Karesh, William P. Clancey, Charles Rauderbaugh and Denne Pettitclerc. I also contacted Wes McCune, Liberty Bell, a West Virginia based magazine, Thomas Francis, personnel at the Anti-Defamation League, Congressman Hansen and the Federal Election Commission.

11. I worked on these stories for most of five weeks. The materials I gathered and studied fill a box and these materials were produced to Liberty Lobby's counsel in this litigation for review. I also read Willis Carto's introduction to Imperium and I read much of Imperium's 615 turgid pages.

12. During the early period of preparing to put out The Investigator,

we received many inquiries from free-lance journalists. One such freelancer was Robert Eringer. Eringer indicated he had several story ideas, one of them a story about Liberty Lobby printed in a recent Mother Jones. I informed him that we were interested in exclusive material and I was at work on my own story on Liberty Lobby. He said he would send in that story, along with three others. Robert Eringer's material arrived in early June. Along with his manuscript, he enclosed a book he had written on the Trilateral Commission.

13. I arranged an interview with Bob Bartell of Liberty Lobby for June 11, 1981 at 3 p.m. I arrived early for the scheduled interview accompanied by Susan Hamburg, an acquaintence who is also an amateur photographer. Bartell

received us in his office at 300 Independence Avenue, S.E. and we talked for approximately 90 minutes. Before leaving Bartell's office, I requested an interview with Carto. Bartell said that he thought it could be arranged and that I should call him the following week. I did so three times. Only one of those times did I actually get through to Bartell. He said he would "get back to me." The following two times my calls were not returned.

14. On Friday, June 12, I began taking all of my notes and material and shaping them into a first draft. Most of the work completed that day was on the Yockey piece.

15. On June 15 or 16, the office received a call from William Cox, a California attorney, who said he had

material on Carto and Liberty Lobby. I called Cox in California. He said he would be in Washington June 21 and we made arrangements to meet in the Hyatt Regency.

16. I met Cox that day at 1 p.m. He supplied me with many court documents and told me about his case against the Institute for Historical Review where he represented Mel Mermelstien. This was the case in California where a judge took judicial notice that the Holocaust occurred, a fact disputed by the Institute. He told me about his background, which included several years in police work and Justice Department policy-making.

17. I spent the next several days writing first drafts of both the Carto and Yockey pieces. These were submitted

to Jack Anderson for review and John Obert for rewrite.

18. Obert, and later Anderson, made several editorial changes in my work. It is standard procedure in Anderson's office to have three or four hands edit an article before it is finally published. Anderson and Obert had been covering Carto for years.

19. I met Cox again in the Hyatt on Sunday, July 19. He brought me up to date about his case and said his research about Carto and his practices was extensive. I showed him parts of the manuscript for fact-checking purposes. He assured me that the story was factually sound. Said he: "I think you have captured the essence of Carto in your piece."

20. I believed at the time and still believe that the articles I have written about Willis Carto and F. P. Yockey published in The Investigator were truthful and accurate reports.

21. I have prepared an appendix to this affidavit which lists the sources for the statements in the articles plaintiff's complain about. The appendix is forty-three (43) pages long and details the sources I relied upon. These sources are patently reliable. The ADL, William Buckley's National Review, congressmen, The Washington Post, The Washington Star, True, The Los Angeles Times and others have consistently and continuously reported that plaintiffs are anti-semitic, fascist and racist.

22. Reading Imperium is one way to see why all of the sources I investigated hold the same belief about plaintiffs. Imperium contains these words:

> "The Jew is a product of another Culture . . . This basic fact kept the Jew entirely separate from the West spiritually and racially -- the West rejected his worldfeeling, he rejected its. Mutual hatred and mutual persecution only strenghened the Jewish race, sharpened its cunning and increased its resentment." (Imperium, p. 311-12)

On race, Imperium has this to say:

> "Thus the Negro in general rejects the white race, and the white race rejects the Negro. The Culture barrier is also present, for the Negro is below our Culture even

though he has lived within its area for centuries." (Imperium, p. 313)

On political power, Imperium has this to say:

> "And although our job is to rebuild we must not lose sight of the reality, for we cannot rebuild until we have captured (emphasis is Carto's). Political power is the essential criterion . . . and to the goal of political power all else must be temporarily sacrificed. To say less is to insure defeat." (Imperium, Carto's introduction, p. XIX).

/s/ Charles Bermant
Charles Bermant

Subscribed and sworn to
before me this 19th day
of August, 1982

/s/ (illegible)
Notary Public

APPENDIX TO AFFIDAVIT OF CHARLES BERMANT

Sources Relied Upon by Defendants With Respect to Plaintiffs' Allegations of Defamation

Set forth below defendants list each sentence from the article which plaintiffs' complaint alleges is false and defamatory. The plaintiffs' numbering system is followed, I through XXX. Immediately following plaintiffs' claim of falsity, defendants set forth the sources relied upon for each such sentence.

Complaint, Paragraph 14,

(I): "America's Neo-Nazi Underground."

Plaintiffs allege this title to be false and defamatory.

Defendants relied upon, inter alia, the following sources in formulating that title:

> [F]or some time an organization whose leadership espouses great sympathy for Hitlerian Nazism, has been proselytizing a vicious and clandestine brand of anti-Semitism on 126 radio stations across the Nation. This organization, the Liberty Lobby . . . .

120 Cong. Rec. E. 4841 (daily ed.), Thursday July 18, 1974 (remarks od Rep. Eilberg) (reprinted, permanent ed. HR 24201, July 18, 1974).

> [T]he real insiders in Carto's apparatus belong to an explicitly Nazi group called the Francis Parker Yockey Movement . . . . [T]he Movement amounts to an under-

> ground which controls [Carto's] . . . other fronts and whose members flaunt swastikas, sing Nazi songs and quote Nazi slogans.

Trento and Spear, "How Nazi Nut Power Has Invaded Capitol Hill," True magazine, November 1969, at p. 35 (emphasis added).

> Carto has taken his philosophy as well as the name of his underground from Francis Parker Yockey . . . patron saint of America's Neo-Nazi's . . . ."

Id. at 37. (Emphasis added).

> Liberty Lobby is, in actuality, a front for Willis Carto's Neo-Nazi activities.

Id. at 39.

> The most powerful front [for Nazi activities] of all, Liberty Lobby . . . .

Id. at 122.

> The National Youth Alliance is now under the complete control of Carto and the Neo-Nazi Francis Parker Yockey Movement.

Id. at 124.

> [Carto] has, in Liberty Lobby, the nucleus for the American Reich.

Id.

> Carto "has begun, as Hitler did, with the establishment of an organization [Liberty Lobby] that preaches national unity but practices divisiveness and hate.

Mermelstein v. Institute For Historical Review, Declaration of William Cox

[plaintiff's attorney] Regarding Urgency of Proceedings, Aug. 10, 1981, at 25.

> Nazism, like Carto himself, does not show its face, and hopes not to until it can show its fist.

Mermelstein v. Institute For Historical Review, Declaration of William Cox, supra, at 2.

> The money trees of which Willis Allison Carto is the creator and proprietor constitute a deep but not impenetrable forest, at the center of which is the tangled underbrush of a secret American Nazism.

Id.

> Yockey suggested, also like Carto, that with a new hero, a Hitler reborn, an American majority can be

> forged to triumph where Hitler failed.

Id. at 9.

> At a party given in his [Carto's] honor by the 'Francis Parker Yockey Movement,' guests wore Nazi insignia, sang the 'Horst Wessel Lied' . . . .

Id. at 11.

> . . . crypto-Nazis of Carto's immediate circle.

Id. at 14.

> the first Nazis, the men Willis Carto admires most.

Id. at 16.

> Willis Carto leads organized anti-Semitism in the United States. His dream is to succeed the Fuehrer as savior of the 'Aryan race' in America and Europe.

Id. at 25.

Jeremy Horne joined Liberty Lobby as Research Director and was rapidly promoted to Corresponding Secretary and Circulation Manager for its publications; he found letters revealing Nazi, anti-Semitic, and racist leanings of Carto. Trento & Spear, supra, at 39.

> 'Hitler's defeat was the defeat of Europe. And America.'

Id. at 121 (quoting from Carto letter).

Willis Carto was a dedicated Nazi. Id. at 121.

> Many of [Carto's right-wing groups were] . . . fronts for his Nazi activities. The more extreme front members were introduced to Nazism . . . .

Id. at 122.

Carto is 'neo-Nazi.'

Id.

On January 25, 1969, at a National Youth Alliance (NYA) meeting in Monroeville, PA, which Carto attended, Nazi trappings were displayed and "Horst Wessel Lied" was sung. Id. at 124. In the words of one observer, "Carto tried to emulate the personal habits that Hitler had become famous for. . . . To his attentive listeners, he was Hitler reincarnated." Id.

> At one NYA organizational party in honor of Carto, Nazi emblems were openly displayed and Hitler's Horst Wessel was sung by the guests.

Remarks of Rep. Eilberg, supra., at E 4841.

> Years ago, Carto wrote to a fellow rightist, Norris Holt: 'Hitler's defeat was the defeat of Europe.

> And America . . . The blame must be laid at the door of the International Jews.'

Id.

> "Horst Wessel Lied" sung after buffet supper on January 25, 1969. (Horst Wessel is a Hitlerian/Nazi song.)

Simonds, "The Strange Story of Willis Carto," National Review, September 10, 1971, at 986.

> Willis Carto is a known admirer of Adolf Hitler.

Brin, "Propragandists Libel Holocaust at UCLA," Orange County Jewish Heritage, March 13, 1981.

> 'Carto wants a nationalist socialist dictatorship' in the 'United States, a former Liberty Lobby executive told a reporter.

Chandler, "Debunkers, 'Of Holocaust linked to Right-Wing Extremists,'" "Los Angeles Times," May 3, 1981.

(II): "But a more sinister neo-Nazi cabal, men of influence and cunning, lurk in the shadows."

Plaintiffs allege this statement to be false and defamatory.

See material cited above in response to plaintiff's paragraph (I), all of which applies here.

(III): "Thus Carto called his base organization the Liberty Lobby and even obtained tax exempt status for it."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon materials supplied by Robert Eringer that Liberty Lobby is a tax-exempt organization. [Defendants note that Liberty Lobby's

Answers to Interrogatories admit that it pays no federal taxes.]

(IV): "The book Imperium, meanwhile, is circulated only among the elect. The admiration for Francis Parker Yockey is also a secret thing, and Willis Allison Carto hides in the shadows of reclusion and anonymity."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in making the above statement:

Imperium is obtainable through Liberty Lobby and other outlets of the Carto organization. Advertisements appear in The Spotlight and its readership is precisely that limited, homogeneous remnant -- or elect -- which Carto seeks to call to his cause.

Carto wrote a 35 page introduction to the second printing of Yockey's Imperium in which he called that racist and blatantly anti-Semitic work, "Prophetic; the work of an intuitive seer." Mermelstein the Institute For Historical Review, Declaration of William Cox, at 9.

> Carto has taken his philosophy as well as the name of his underground from Francis Parker Yockey . . . patron saint of America's Neo-Nazis . . . . Carto was strongly influenced by Yockey . . .

Trento & Spear, supra, at 37.

> A small and dedicated Far-Rightist Cult has sprung up about the figure of Yockey since his death, with Carto at its center and Imperium as its holy book.

"Facts," Anti-Defamation League of B'nai B'rith, July 1968, (Volume 18, No. 2), at 464.

> [B]ehind the scenes, and often far away (Los Angeles,) there is a more elusive figure -- with a passion for anonymity -- who is the real boss of Liberty Lobby . . . . Carto . . . .

Id. at 459.

> Liberty Lobby's "founder and silent leader is Willis A. Carto.

Id.

> Carto has . . . made a policy to keep his name far in the background, or missing entirely, when Liberty Lobby is concerned . . . .

Id.

> Carto was "living like a recluse in the basement of the Liberty Building . . . .

Simonds, supra, at 990.

> Nazism, like Carto himself, does not show its face, and hopes not to until it can show its fist.

Mermelstein v. Institute For Historical Review, Declaration of William Cox, supra, at 2.

In "Power Base For Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," Washington Post, May 16, 1977, Carto is called "reclusive," (p. A-1), and is said to operate in Liberty Lobby's "background," (A-2).

(V): "Why does the Anti-Defamation League believe Carto's 'outreach makes him the leading anti-Semite in the country'?"

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon a statement made in an interview by Irwin Suall. Publications by the ADL verify this statement:

> Charges by the ADL, . . . accused Carto of setting up Liberty Lobby as a 'front' for his seamier operations, including Liberty & Property, a clearinghouse for keeping informed on anti-Semitic activities; 'Western Destiny,' a magazine with racist, Nazi-type articles and 'Noontide Press,' publisher of anti-Semitic, racist and pro-Nazi books, including 'Imperium,' by the late Nazi apologist Francis P. Yockey. The Yockey book contains a dedication to Adolf Hitler and a

laudatory 35-page introduction by Carto.

Press release, ADL of B'nai B'rith, pp. 1-3.

The Spotlight, Liberty Lobby's principal newspaper, disseminates an array of racist, anti-Semitic propaganda reflecting the prejudices of its publisher, Liberty Lobby, a Washington-based far-right extremist organization. It is this effort to camouflage the true bigotry of its pages and to deceive its readers that make The Spotlight more insidious than other publications of its kind -- and distinguishes it from the crudes, more blatant hate sheets of the neo-Nazi organizations and Ku Klux Klan groups plaguing the American scene.

> Liberty Lobby, headed by Willis A. Carto, a long-time anti-Semite and its founder and treasurer. . . .

Press release, Gans, "Spotlight on Hate," June 20, 1980, ADL of B'nai B'rith.

The ADL's "Facts," (vol. 18, No. 2) (July, 1968) stated:

> Willis A. Carto was the organizer and is still the main moving force behind [Liberty Lobby's] myriad activities. Carto . . . has also maintained significant ties with the demi-world of anti-Semitic propagandists in America.

"Facts" supra, at 459.

> "Zionism" has long been the operational euphemism for Judaism, and "Zionists" for Jewry, in the vocabulary of many anti-Semites.

> And while the Liberty Lobby stated clearly that Zionism is not a religious movement, its attack was aimed generally at America's Jews.

Id. at 463.

(VI): "And why did the late Drew Pearson describe Carto as a 'Hitler fan' and claim Liberty Lobby was 'infiltrated by Nazis who revere the memory of Hitler?'"

Plaintiffs allege this statement to be false and defamatory.

Defendants relied, inter alia, upon the following in making the above statement:

> While the nation has been preoccupied with the communist menace, a nest of Nazis has infiltrated Washington. . . . The ringleader is Willis Carto.

"Pearson-Anderson Special Weeklies," Release Monday, April 21, 1969.

> Liberty Lobby is an "organization of the fascist right, while Carto, founder of the Liberty Lobby, is the big wheel in the neo-Nazi movement.

"MGR [Drew Pearson's 'Merry Go Round'] For Rel[ease] Monday, June 9, 1969.

(VII): "Everything he does seeks to destabilize society. His panic mailings, survivor-group propaganda approach creates a climate of fear and danger. And it is only within such climate he will be able to seize the real political power he seeks."

Plaintiffs allege this statement to be false and defamatory.

Page 23 of the Bermant article on Carto attributes the allegedly offensive

phrase to "an attorney who has dealt with [Carto] in court." The attorney who so described Carto and his activities is William Cox, attorney for Holocaust survivor Melvin Mermelstein.

(VIII): "Why does Scott Stanley, the managing editor of the John Birch Society's American Opinion, say, 'In my opinion, the preservation of anti-Semitism as a movement has occurred because of the activities of Willis Carto?'"

Plaintiffs allege this statement to be false and defamatory.

Defendants relied on Robert Eringer's information concerning Stanley's statement and the above materials regarding anti-Semitism.

(IX): "Last, but perhaps most pertinent why did Willis Carto choose a

neo-fascist to be his inspiration and role-model?"

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon Yockey's Imperium and on Carto's introduction to that book, inter alia, to establish that Carto admires and reveres the memory of Yockey. It is abundantly evident from the sources quoted above and from Imperium that Yockey was a "neo-fascist." It is also clear that Carto saw Yockey as an inspiration and role-model. The following is from Carto's introduction to Imperium:

> Dimly, I could make out the form of this man [Yockey] this strange and lonely man. . . . I knew that I was in the presence of a great

force, and I could feel History standing aside me.

* * *

Twice, I attended the [Yockey] hearings, and each time was fascinated by this man, Yockey. . . . As his [Yockey's] gaze swept across, and then to me, he stopped and for the space of a fractional second, spoke to me with his eyes. In that instant we understood that I would not desert him.

* * *

Is America a free country when a sensitive genius [Yockey] can be held in the filthiest of jails with Negro and White criminals . . . a sincere patriot like Francis Parker Yockey, whose every thought and

effort was in behalf of his fellow man?

(X): "After drifting from one right-wing group to another, he decided to organize 'A lobby for patriotism' he would call Liberty Lobby."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied, inter alia, upon the following in making the above statement:

> After serving as a debt collector for the Household Finance Corporation during the mid 1950s, Carto was or became, a director of the "Libertarian Congress of Freedom", executive secretary of "Liberty and Property," (an anti-Semitic group), and formed the "Joint Council for

> Repatriation") (for the deportation of American Blacks to Africa).

Mermelstein v. Institute for Historical Review, Declaration of William Cox, at 4-5.

> By 1962, Carto 'had become' involved in over thirty right-wing groups, 'many of them fronts for his Nazi activities.'

Trento & Spear supra, at 122.

Carto's movement to and from these various groups and activities is described by the verb "drift". Webster's New World Dictionary (2d Coll. ed., 1980), defines the verb "to drift" as "1. to be carried along by or as by a current 2. to be carried along by circumstances . . . ." It was and is defendants' conclusion that use of the verb "to drift" fairly and accurately

describe Carto's movement from one ultra-right group to another during the period in question.

(XI): "About this time, Carto moved his operations into a rented thirty-room Edwardian building on the corner of Independence Avenue and Third Street in Washington, D.C. The building now is owned by the Government Educational Foundation, which charges Liberty Lobby $6,000 a month rent. The Chairman and owner of the Foundation is Willis Carto . . . ."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon information supplied by Robert Eringer and upon the following:

> GEF [Government Educational Foundation] is Liberty Lobby's landlord .

> . . it owns the building in which the lobby is housed.

"Power Base For Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," Washington Post, May 16, 1977 p. A-2.

> Purchaser in 1965 and sole owner since 1969 of Liberty Lobby's building at Third Street and Independence Avenue is the Government Education Foundation (GEF). Carto signed as Chairman of GEF when GEF purchased the Liberty Lobby building.

Simonds, supra, at 988.

(XII): ". . . The Spotlight, which today boasts 335,000 readers . . . ."

Plaintiffs allege this statement to be false and defamatory.

Plaintiffs own publication, The Spotlight, stated in its January 5 & 12

[sic], 1981 edition, that Spotlight has a "grand total of 345,000" subscribers. ("In 1980 You Got The News the Establishment Tried to Hide.")

(XIII): "He . . . conducts his business by way of conference calls from a public telephone . . . . "

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon information provided by Robert Eringer.

(XIV): "In 1968, another Carto 'front' organization called United Republicans for America used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon information supplied by Robert Eringer for the

content of their statements concerning Carto's activity in Liddy's 1968 campaign, and upon the statement of William Cox:

> A sub-group of Liberty Lobby and a part of the Carto empire is 'United Republicans of America (which is not a Republican Party organization but is, rather, aimed at a takeover of the Republican Party).'

Mermelstein v. Institute for Historical Review, Declaration of William Cox, supra, at 2.

(XV): "In the mid-50's when Carto was drifting from one right wing organization to another he . . . organized and promoted the Joint Council for Repatriation. What he meant by 'repatriation' was the forced deportation of all blacks to Africa."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in making the above statement:

> Liberty Lobby's 'Public Policy Proposals include schemes for sending American blacks back to Africa. "The Liberty Lobbyist," Editorial, Washington Star, April 24, 1981,

> Carto tried to launch the "voluntary" repatriation of blacks to Africa. "Power Base for Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," Washington Post, May 16, 1977.

The National Review had this to say about Carto's racial attitudes and prejudices:

> Carto expressed his views on racial purity more frankly in private correspondence:

The danger of "racial mongrelization" was not a new preoccupation for Carto. All through the years with Liberty and Property, he corresponded tirelessly with segregationist leaders. In 1956, in a letter to Judge Tom P. Brady of the Mississippi Supreme Court, an originator of the White Citizens' Council, Carto proclaimed: "THE ISSUE IS NOT IDEOLOGICAL. THE ISSUE IS ETHNOLOGICAL."

"The revolutionists have seen to it," Carto wrote the racist author Earnest Sevier Cox in 1955, "that only a few Americans are concerned about the inevitable niggerfication of America." But Carto had a plan, for a "flank attack." He established, and promoted secretly the

Joint Council for Repatriation -- a send-'em-back-to-Africa movement with an added benefit: ". . . such a movement would be the strongest blow against the power of organized Jewry that can be imagined."

Carto always had his eye on Jewry. From a letter to one Norris Holt:

> There are 600 million Chinese and about 200 million Russians. All united in a determination to destroy the West. And we have been so misled that we live in a dream world -- far away from reality. Hitler's defeat was the defeat of Europe. And America. How could we have been so blind? The blame, it

> seems, must be laid at the door of the international Jews. It was their propaganda, lies and demands which blinded the West as to what Germany was doing.

Carto put it all more succinctly in a memo to himself:

> Who is using who? Who is calling the shots? History supplies the answer to this. History tells us plainly who our Enemy is. Our Enemy today is the same Enemy of 50 years ago and before -- and that was before Communism. The Communists are "using" the Jews we are told . . . who was "using" the Jews fifty years ago -- one hundred or one thousand

> years ago. History supplies the answer. The Jews came first and remain Public Enemy No. 1.

The indefatigable Willis Carto had yet another project cooking in the late Fifties. In January 1957 he wrote to Judge Brady:

> Now Judge, I do not think that I have ever mentioned to you that for over a year I have been working on something tentatively called the LIBERTY LOBBY. Briefly, this involves the establishment of an office in Washington to lobby for patriotism. . . . you can readily see the tremendous importance to the Repatriation scheme if this LOBBY ever gest

> [sic] set up. On the other hand, you can see that there must never be an obvious connection between the two, for if there is, either would kill the other off, or at least harm it very gravely. Therefore, I have had to make a decision and it is that the logical thing to do is to become publically [sic] identified with the LOBBY only. . . .

In the mailing to seven hundred conservatives, Carto outlined his plan for a "pressure group for patriotism," and sought to raise $75,000. By January 1958 only $15,000 had been raised; however, Liberty Lobby set up a "research

> department" July 4, in the offices of the American Council of Christian Laymen.

Simonds, supra, at 979

In a letter to Holt, ["an extreme right-wing leader in Sausalito, California"], Carto wrote:

> Please don't do anything to publicize the JCR [Joint Council for Repatriation of Negroes Back to Africa] yet. I want to keep it as quiet as possible until we get a good, strong group behind us. To come out prematurely might mean immediate smears and destruction by the J's. If there are some stong men behind us, they won't be able to do that. . . .

(XVI): "And Birch Society editor Scott Stanley notes that 'Whenever you

find anti-Semitic litature coming from some little fly-by-night front, it seems to be associated with the Carto network.'"

Plaintiffs allege this statement to be false and defamatory.

Defendants relied on the quote supplied by Robert Eringer and the above materials relating to anti-Semitism.

(XVII): Illustration: "Carto often observes interviews of prospective employees through a mirror."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied on information supplied them by Robert Eringer.

(XVIII): ". . . Jeremy Horne, a veteran member of the Liberty Lobby staff."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in formulating the above description:

> Had it not been for a conscientious conservative named Jeremy Horne, Carto might still be regarded as just another right-wing extremist. Horne joined Liberty Lobby as a research director in April, 1966. Within months, he worked his way up to corresponding secretary and circulation manager for its numerous publications. He heard rumors around Liberty Lobby headquarters that Carto wasn't the legitimate conservative he tried to appear.

Trento and Spear, supra, at 39.

> Horne subsequently found racist and antiSemitic correspondence between Carto and other Liberty Lobby insiders. Horne turned over that information to the FBI and to columnists Drew Pearson and Jack Anderson. It is implied and not stated in the quoted source material that Horne left shortly thereafter.

Id. at 39 and 121.

(XIX): "Illustration depicting a man bearing a strong resemblance to Adolf Hitler, with Hitlerian moustache and right hand raised in the unmistakable suggestion of a Nazi salute, captioned "Carto, whose speeches were once a staple of ultra-right gatherings, no longer speaks in public." (Quoted from Complaint.)

Plaintiffs allege this illustration to be false and defamatory.

The illustration does not show a man making a Nazi salute. It was based on an actual photograph of Willis Carto. But even if plaintiffs believe it is their version of a Nazi salute, defendants have reliable grounds for believing Carto would give a Nazi salute.

> An observer at the National Youth Alliance meeting in Monroeville, Pennsylvania on January 25, 1969 stated, 'Carto tried to emulate the personal habits Hitler had become famous for . . . . [T]o his attentive listeners he was Hitler reincarnated.'

Trento and Spear, supra, at 124.

(XX): "Even more to the point, why would a man who says he is not anti-

Semitic establish something called the Institute for Historical Review? The Institute, an integral part of Carto's West Coast operation, was set up to disprove that any Jews died in World War II gas chambers."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied, inter alia, upon the following in making the above statements:

> [A]s a fund-raising bulletin issued by the Institute says, 'the main focus' of the organization's 'research and education program has been the debunking of the so-called "Holocaust" . . . .'

Mermelstein v. Institute for Historical Review, Declaration of William Cox, supra, at 3.

> The Institute for Historical Review has one mission: To persuade the world that Hitler did not and the Nazis did not carry out a systematic extermination of Jews.

"Holocaust is surely real, but the $50,000 may not be," Long Beach Press-Telegram, p. B-10.

(XXI): "After consulting with attorney William Cox, Mermelstein filed an application with the Institute within a few weeks. But 'Brandon' stalled, saying the Institute would first examine an application from famed Nazi hunter Simon Wiesenthal. Subsequently Wiesenthal withdrew his claim, and Mermelstein waited to testify. Instead, he was told that the Institute would not take up his claim until 'later.' Angered at being put off for so long a

time after having been threatened to respond immediately or suffer the consequences, Mermelstein and Cox filed a million-dollar suit against the organization, saying they would prove in court the the Holocaust was fact, not hoax."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in making the above statement:

The Los Angeles Times contained the following commentary relevant to plaintiffs' paragraph XXI in its Sunday, May 3, 1981 edition:

> The director of the Institute for Historical Review [David McCalden, aka Lewis Brandon] has quit, admitting that he has concealed his true identity. And he says that a $50,000 reward the

Institute offered was a publicity gimmick.

* * *

Brandon and his institute did not get much public attention until he offered a $50,000 reward to anyone who could prove that at least one Jew was gassed to death at Auschwitz, the death camp in Poland.

Two persons accepted the challenge and the Institute for Historical Review (IHR) has been re[ceiving] wide publicity as well as outrage from Jews around the world.

* * *

One of the two who accepted the reward challenge is Melvin Mermelstein, 54, a Long Beach busi-

nessman, who presented Brandon with an affidavit of his experiences at the Auschwitz and Birkenau camps in 1944.

* * *

On Feb. 19, Mermelstein sued Brandon, the IHR and a web of other persons and organizations tied to the institute. Mermelstein claims Brandon reneged on the reward offer.

Brandon, meanwhile, recently admitted to The Times and to subscribers that his real name is William David McCalden and that the reward was a gimmick to gain publicity for the institute's causes.

* * *

. . . McCalden told The Times that the IHR has ties to Liberty Lobby, a Washington, D.C.-based group that publishes allegedly racist materials.

Liberty Lobby is headed by Willis A. Carto. . . .

* * *

McCalden said he and Carto were involved in founding IHR here in the winter of 1978.

* * *

As director of the IHR, [Brandon]. . . earned $22,000. He acknowledged that Willis Carto is treasurer of Liberty Lobby and that Carto's wife Elisabeth who is German-born is treasurer of the Legion for the Survival of Freedom, the holding corporation for both

the institute and the publishing arm of the Carto operations known as Noontide Press.

* * *

. . . close connection between the Cartos and the institute. . . .

* * *

The IHR operated out of its Torrance warehouse and office without fanfare until this February, when Mermelstein filed his suit asking $17 million in damages for "injurious denial of established fact." The suit alleges that the institute breached a contract with him regarding proof of the Holocaust gassing.

Mermelstein was the first to apply for the $50,000 reward, offered originally at the "First

Revisionist Convention" held in the summer of 1979. . . .

Contest rules included these conditions:

-Claimants were to attend at their own expense the "Second Revisionist Convention" . . . where they were to present evidence. . . .

-A tribunal of experts, picked up by the IHR, was to determine the validity of the testimony and evidence presented.

-Claimants were asked to give their "ethnic origin" and answer questions such as, "Were you an eyewitness to the gassing operations?" and "Did you keep a dairy [sic] or take photos?"

Mermelstein was not the reward's only claimant.

Famed Nazi-hunter Simon Wiesenthal, the Austrian credited with tracking scores of Nazi war criminals since World War II, applied in January of 1981.

McCalden, apparently wanting to achieve greater publicity for the IHR by taking on Wiesenthal, wrote Mermelstein's attorney that he would deal with Mermelstein's claim after the institute had decided Wiesenthal's. But Wiesenthal, convinced that the judges chosen by the IHR would be biased, on March 4 wrote "Brandon" that he was withdrawing.

Meanwhile, Mermelstein, claiming that he had submitted required

proof that Jews had been gassed, had already sued.

* * *

In a letter dated April 16, 1981, to subscribers to the Journal of Historical Review, Brandon said the $50,000 reward was "our No. 1 gimmick" to obtain publicity for institute activities.

"No one pretended that the reward was an academic exercise, . . . but at least it could attract attention to our genuine academic exercises. . . . All we needed was some naive zealot to walk into our trap. And even though we had to artificially extend the duration of the reward in the process, we did eventually attract the most emi-

nently suitable mouse into our richly baited trap!"

The "mouse" was an apparent reference to Nazi-hunter Wiesenthal.

In the previous Revisionist Newsletter, however, "Brandon" asserted: "Should we lose this case (the Mermelstein suit) the Institute . . . is finished. Make no mistake about that." He also pleaded for subscribers to contribute money for legal defense.

Chandler, . "'Debunkers' of Holocaust Linked to Right-Wing Extremists," Los Angeles Times, Sunday, May 3, 1981, at Part 1, pp. 3, 19, 20.

Carto was a founder of the Institute for Historical Review (IHR). "Auschwitz Survivor Suing For $50,000

Prize in Dispute on Nazis' Gassing," New York Times, March 11, 1981.

> The racism of the most visible Carto organizations is masked by an apparent respectability. Nowhere has Carto sought that respectability more than in the Institute for Historical Review . . . . The institute is described in its publications as "a non-profit educational foundation" established in 1978 "to investigate the positive causes and nature of war, and to disseminate those findings." Achieving white Anglo-Saxon supremacy is, for Willis Carto a "positive" cause of war. In the meantime, as a fund-raising bulletin issued by the Institute says, "the main focus" of the organization's

research and education program has been the debunking of the so-called "Holocaust" which this bulletin alleges "is continually vaunted as the main 'reason' for America's dog-like devotion to the illegal state of Israel.

* * *

In fact, Willis Carto has goals more far-reaching than propaganda and persuasion. The institute is but one arm of an organized, nationwide campaign of anti-Semitism and racism that has as its ultimate objective domination by a pure "Aryan" race of all North America and Europe under the leadership of Willis Allison Carto."

In this campaign, the plaintiff, Melvin Mermelstein, was selected as a specific target precisely because he was a survivor of the Holocaust and of the Nazi death camp at Auschwitz. In choosing him, the institute attacked a man who was extraordinarily vulnerable to anti-Semitism and, particularly, to assertions that he lied in bearing eye-witness testimony to the unspeakable cruelties of the Holocaust -cruelties that have obsessed him since he saw his mother and sisters driven into the gas chambers at Auschwitz and since he discovered that he alone of his family had escaped Nazi oppression alive.

Whatever right Willis Carto has to lie about the Holocaust, he cannot with impunity turn the lie into a dagger aimed at the heart of a Holocaust victim whose psychological vulnerability was intense and deep.

* * *

If Liberty Lobby is the base of Carto's operations, the Institute for Historical Review and the Legion for the Survival of Freedom are its heart. These are the organizations directly dedicated to clearing Hitler's name and persuading Americans that Francis Parker Yockey was right, and the world wrong, about the Nazi genocide of European Jews.

* * *

That is the message of the institute's Journal of Historical Review and "Revisionist Convention" conducted by the institute each year with the intention of revising history to erase the Holocaust from its pages. It was the message of a "reward" offered by the institute at the 1979 convention: $50,000 to anyone who could prove that Jews were killed in gas chambers at Auschwitz.

* * *

Carto embraced the idea and told McCalden ["Brandon," Director of IHR] the "reward" offer would be announced in a press conference after the 1979 "Revisionist Convention.

* * *

Melvin Mermelstein, "outraged," knew the gates of Hell that waited if Carto could first persuade millions that Hitler's deeds were fiction and could then turn Yockey's fantasy into deeds. Mermelstein wrote letters to the Press-Telegram, a daily newspaper published in Long Beach, California; to Jewish Heritage, a weekly newspaper published in Los Angeles; and to The Jerusalem Post, an internationally circulated English-language daily newspaper published in Israel. All three published Mermelstein's letter. The publication in the Jerusalem Post brought swift responses from Carto's "Liberty" empire employees and associates.

One response, an "Open Letter to a Racist and Exterminationist," was widely circulated to Jews as well as to others. In it, ... a member of the Editorial Advisory Committee of the Journal for Historical Review, accused Mermelstein of "peddling the extermination hoax," and of surviving the Holocaust through "pecuniary stealth" and through collaboration with the Nazis. Since [the author of that letter] . . . Carto and their associates contend in the Journal for Historical Review that no Jews were murdered by the Nazis, it is clear that this letter's infamous lies could only have been contrived to damage Mermelstein's reputation and to inflict the most grievous

personal wounds. Mermelstein separated from his father and brother at Auschwitz at his father's bidding. To suggest that the separation that saved his life was collaboration with the Nazis who killed his mother and sisters, and who almost certainly killed his father and brother, was to strike Mel Mermelstein at the most vulnerable, the most easily penetrated part of his personal armor. It was a sadistic stroke worthy of the first Nazis, the men Willis Carto admires most.

* * *

March 20 - A letter from the institute to William Cox proposed that Mermelstein's evidence be considered at the institute's "Revision-

ist Convention" November 20-23 at the University of California's Lake Arrowhead Conference Center.

March 31 - A letter to the institute from Cox noted that the institute had apparently expanded the proof desired from Mermelstein to include evidence that gassing of Jews was an official policy. The letter also noted that when the summons and complaint were served on March 17 to a person who acknowledged himself to be David McCalden, that person "refused to acknowledge himself to be 'Lewis Brandon.'" The letter added: "I must ascertain with some greater degree of certainty who it is with whom I correspond. . . . If your answer is not filed with the

Superior Court by April 17, 1981, I intend to take action to receive a default judgment on the proceedings."

April 16 - a letter from "Lewis Brandon" to subscribers to the Institute for Historical Review described the $50,000 "reward" offer as "our No. 1 gimmick," and declared further:

The reward was a gimmick to attract publicity; and it was a gimmick that worked! All we needed was some naive zealot to walk into our trap . . . .

* * *

July 13 - an article headlined "Exterminationist refuses Offer" was published in Carto's weekly newspaper, The Spotlight. This

article alleged, falsely, that "Mel Mermelstein, peripatetic holocaust 'witness,' has refused a continuing offer by the Institute for Historical Review (IHR) to consider his claim for the $50,000 reward offered by the institute to the first person who can prove that Jews were gassed in gas chambers at Auschwitz." The article further alleged, falsely, that Mermelstein "launched a publicity blitz under the guise of a $17 million lawsuit."

In fact it was the Institute for Historical Review that had, having pressed Melvin Mermelstein for a quick acceptance of its challenge, then refused to give Mermelstein's application timely consideration.

It was the institute whose director declared that the "reward offer" was a "publicity gimmick." But having engineered a confrontation that was to plunge Mermelstein into deep mental anguish, having aimed the dagger of a lie at his victim's heart, Willis Allison Carto used the most widely circulated of his publications and another lie to twist the dagger.

Melvin Mermelstein resisted. He feels an obligation to resist. The necessity of such resistance is suggested in The Informed Heart, a book in which Dr. Bruno Bettelheim, himself a former Nazi concentration camp prisoner, discusses that experience and the psychology of its perpetrators and victims.

* * *

A "Reward" offer that started as a "publicity gimmick" became a weapon for Willis Carto and a matter of honor for Melvin Mermelstein. The weapon continues to function so long as resolution of this dispute is delayed. While there are delays, Mermelstein is likely to suffer continued depression that will cause continuing damage to his family relationships and to his ability to perform effectively in his business. A swift adjudication of the matters at issue would enable him to resume the peaceful, secure life that was interrupted by the challenge from the Institute for Historical Review.

Mermelstein v. Institute for Historical Review, Declaration of William Cox, supra, 3-4, 11-12, 15-19, 22, 26.

(XXII): "Outraged over whistle blowing by people who had worked for him, Carto turned to lie detector and voice stress tests to ensure loyalty and operational security. Each new employee now must sign that they are willing to take such tests at any time. Refusal constitutes grounds for dismissal."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in making the above statement:

"Vandalism and thefts led to the institution of lie detector/polygraph tests." "Power Base for Hard Right, Willis Carto: Liberty Lobby's Unseen

Boss," Washington Post, May 16, 1977 at p.A-3.

> In May 1970 all employees were ordered to take lie detector tests. They were asked if they had stolen money or lists, or had been in contact with the FBI or ADL.

Simonds, supra, at 989.

Robert M. Bartell, Chairman of Liberty Lobby's Board of Policy, stated in a June 11, 1981 interview with reporter Bermant that lie detector and voice stress tests were instituted to insure "loyalty and operational security." He indicated that refusal to take such tests would be grounds for dismissal. Responding to Mr. Bermant's question on how applicants are "screened for employment by Liberty Lobby, Bartell stated:

Because of the nature of our institution, it is important for us to attempt to force out any infiltrator that might come in . . . . And as in every business of this nature there are people who want to know more than they can find out simply by talking or belonging or being involved. Because of this we instituted a polygraph test for all our employees. Everyone who comes to work signs an agreement that they are willing to take the polygraph. In recent years the test has utilized the stress analysis rather than the lie detector machine, and does it play an important part in our organization? Yes, we've caught people stealing from us and selling information

about our organization to other people. There was no question of guilt. It was ascertained and subsequently proven, so it plays an integral part not so much in the standpoint . . . we know the test is embarrassing for some people . . ." I don't have anything to hide or I wouldn't be here" that sort of thing . . ., but when strange and unexplainable things happen and point to a leak or situations that are uncomfortable for us, then we use the voice stress analysis. It's important from that standpoint. It's not the kind of thing where everyone who comes in gets a voice stress test.

Asked if such a test is a condition of employment by Liberty Lobby, Bartell

stated, "yes, it is a condition of employment." And when asked if hiring was subject to the taking of such a test, Bartell reiterated:

> Yes, subject to it . . . . They must agree before they're hired. They understand that. We're depriving them of no rights. If you don't want to take the test, you don't take the test. If you want the job . . . you have to be subject to it.

Then, asked whether a Liberty Lobby employee who subsequently refused to take a lie detector or voice stress test would be fired, Bartell responded:

> I would say the chances are pretty good . . . unless there's a pretty substantive reason why they can't or there's knowledge on our part

there could be no participation on what we're trying to figure out. There are exceptions to the rule, but unless that . . . we have to take the attitude they've got something to hide.

(XXIII): "Liberty Lobby often hires outside consultants to conduct interviews, with Carto watching through a one-way mirror."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied on information supplied by Robert Eringer. [Defendants note that plaintiff's answers to interrogatories admit that three outside consultants have been retained to conduct polygraph exams of employees. Interrogatory Answer 15.]

(XXIV): "The ADL called it a plan to establish a right-wing military dictatorship."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied on information supplied by Irwin Suall of the ADL and the following additional information:

Operation Survival appears to have been an ongoing project of the Liberty Lobby. Liberty Lobby's twentieth anniversary convention occurred in 1975.

> Survival was the topic that occupied two closed sessions of the convention, where the Liberty Lobby's revived 'Operation Survival' policy was presented to the delegates for eventual approval by the 25,000 voting members.

> The 19-page policy statement, a guide to survival of the enfisioned collapse of American society and [sic] pictured looters, rapists and killers terrorizing the countryside.
>
> The manual stressed the need for conservatives to prepare for the Holocaust by now forming "survival groups" that would store weapons, gold and silver and dehydrated foodstuffs.

"Birthday Marked By Liberty Lobby," New York Times, March 9, 1975.

> At its 20th anniversary convention in Torrance in 1975 the Liberty Lobby unveiled its "Operation Survival" policy, a 19-page guide to surviving the envisioned collapse of U.S. society when

> murderers, rapists and looters will swarm throughout the countryside terrorizing all but prepared patriots.
>
> * * *
>
> Disaster is due, they say, because of the rise of international communism, the establishment of the state of Israel and the inter-racial atmosphere of the United States.

Haas, "Liberty Lobby, gun merchant hold seminar," Torrance. California, Daily Breeze, Sunday April 26, 1981, at A-3.

(XXV): "In this scrutiny of Willis Carto and what he represents, five of the characteristics John Roy Carlson said identify inherent or incipient fascism have manifested themselves in greater or lesser degree. They are: a

virulant anti-Semitism to dissolve the social fabric; the pitting of group against group and race against race to weaken national unity; incessant Red-baiting to smoke screen fascist propaganda; super patriotism and a perverted brand of nationalism; and the creation of a 'survivor mentality' to further fragment society. Three other characteristics are also evident in the Carto record; the use of lies and half-truths to win the support of the politically ignorant; adulation of Adolf Hitler; denigration of democracy and agitation for an authoritarian New Order."

Plaintiffs allege this statement to be false and defamatory.

The following documentary excerpts used by defendants indicate that Carto is, in fact, described correctly by the

characteristics Carlson enumerated. Carto,

> buys the Yockey [Nazi] line on the Jews. Simonds, supra, at 981.

> Carto and the Liberty Lobby are latently racist and fascist. Here the evidence was pretty nearly undeniable.

Id., at 987.

> Carto, in a letter to an associate concerning a new tabloid, stated: "I think there should be more stuff in it about the Wall Street jew . . . ." Concerning underground newspaper editors of the left pictured in Time, Carto stated, "[e]ach of them was a particular type of Jew."

Id., at 989.

> Carto is involved in the publication of racist and anti-Zionist literature.

"Power Base for Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," Washington Post, May 16, 1977, at p.A-1.

> The money trees of which Willis Allison Carto is the creator and proprietor constitute a deep but not impenetrable forest, at the center of which is the tangled underbrush of a secret American Nazism.

Mermelstein v. Institute for Historical Review, Declaration of William Cox, supra, at 2.

> The racism of the most visible Carto organizations is masked by an apparent respectability. . . . Achieving white Anglo-Saxon suprem-

> acy is, for Willis Carto, a 'positive' cause of war.

Id., at 3.

> In fact, Willis Carto has goals more far-reaching than propaganda and persuasion. The Institute [i.e. for Historical Review] is but one arm of an organized, nationwide campaign of anti-Semitism and racism that has as its ultimate objective domination by a pure 'Aryan' race of all North America and all Europe under the leadership of Willis Allison Carto.

Id. at 4.

> Yockey, like Carto, declared that Hitler and Germany failed in their historic mission because of the Jews. Yockey suggested, also like Carto, that with a new hero, a

> Hitler reborn, an American majority can be forged to triumph where Hitler failed.

Id., at 9.

> . . . crypto-Nazis of Carto's immediate circle.

Id., at 14."

> the first Nazis, the men Willis Carto admires most.

Id., at 16.

> It is Willis Carto's self-decreed mission to multiply into a majority the number of Americans who share that Hitlerian concern, [of the "niggerfication of America," [(Carto's words)].

Id., at 24-25.

> Willis Carto leads organized anti-Semitism in the United States. His dream is to succeed the Fuehrer as

savior of the 'Aryan race' in America and Europe.

Id., at 25.

The following is taken from 120 Cong. Rec. E. 4841 (daily ed., July 18, 1974) (remarks of Rep. Eilberg):

An outspoken anti-Semite who has professed an abiding admiration for Hitler and Nazi Germany and has been the moving force behind a network of Jew-hating organizations and publications over the years is also the unpublicized force behind "This Is Liberty Lobby," an extremist radio program carried five times a week by some 126 stations around the country.

His name is Willis A. Carto.

* * *

Liberty Lobby was founded as a front for the seamier operations of Carto, among them Liberty and Property, a clearinghouse for keeping informed on anti-Sematic activities; Western Destiny, a magazine which published racist, Nazi-type articles, and Noontide Press, publisher of anti-Semitic, racist, and pro-Nazi books - including "Imperium," by the late Nazi apologist Francis P. Yockey, a book containing a dedication to Adolph Hitler and a laudatory 35-page introduction by Carto himself.

Carto, 47 years old, began to work full time as a professional bigot and organizer in 1954 when he became executive secretary of Liberty and Property. A racist, as

well as an anti-Semite, he complained while working for Liberty and Property, that "only a few Americans are concerned about the inevitable niggerfication of America." His 20-year career includes serving as a director of Congress of Freedom a right-wing, racist organization, and as an organizer for the John Birch Society.

In 1966, Carto took over the venerable American Mercury name and placed it on the masthead of a quarterly devoted largely to anti-Jewish hate and issued in tandem with the semi-monthly Washington Observer Newsletter, similarly laden with unvarnished anti-Semitism.

* * *

In a 1967 U.S. Court of Appeals case brought by Liberty Lobby against columnist Drew Pearson - which Liberty Lobby lost - Judge Warren E. Burger (now Chief Justice of the U.S. Supreme Court) said the organization's activities reveal "overtones of anti-semitism and racism." [See Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 n.7 (1968).]

* * *

In 1971, Liberty Lobby published a 40-page pamphlet, "America First," ostensibly an analysis of Middle East problems.

* * *

[T]he pamphlet is a tirade of hate blaming the Jews not only for

Middle East crises but for the crucifixion of Jesus, the Russian Revolution, and the two world wars. It questions the allegiance of American Jews and suggests that the only Jews who are loyal Americans are those few who are openly pro-Arab.

* * *

Years ago, Carto wrote to a fellow rightist, Norris Holt: "Hitler's defeat was the defeat of Europe. And America . . . . The blame must be laid at the door of the international Jews."

Carto has been associated with "anti-Semitic" and far rightist groups. Schrag, "America's Other Radicals," Harper's, August, 1970, at 44.

"Carto sees his media empire as a means of obtaining political power in order to effectuate his policies of racism." Mermelstein v. Institute for Historical Review, Supplemental Points and Authorities and Argument Regarding Corporate Liability, (dated Aug. 10, 1981), at 15.

Carto is "a self-avowed admirer of Adolf Hitler." Chandler, "'Debunkers' of Holocaust Linked to Right-Wing Extremists," Los Angeles Times, May 3, 1981.

> 'Carto wants a nationalist socialist dictatorship' in the United States, a former Liberty Lobby executive told a reporter.

Id.

"Willis Carto is a known admirer of Adolf Hitler." Brin, "Propagandists

Libel Holocaust at U.C.L.A.," Orange County Jewish Heritage, March 13, 1981.

> [B]ehind the scenes, and often far away (Los Angeles), there is a more elusive figure - with a passion for anonymity who is the real boss of Liberty Lobby . . . . Carto . . . has also maintained significant ties with the demi-world of anti-Semitic propagandists in America.

"Facts," at p. 459, July, 1968, (ADL of B'nai B'rith, vol. 18, no. 2).

Carto has a "vision of a fascist future." Trento and Spear, supra, at 36.

> Through the Noontide Press in Sausalito, California, Carto publishes books which mock the Jews and extol Aryan culture.

Id.

> [T]he real insiders in Carto's apparatus belong to an explicitly Nazi group called the Francis Parker Yockey movement. . . . [T]he Movement amounts to an underground which controls [Carto's] . . . other fronts and whose members flaunt swastikas, sing Nazi songs and quote Nazi slogans

Id.

> Carto tells "his intimates" that "[t]he problems of our civilization . . . are the fault of Jews and Negroes."

Id.

> Carto has taken his philosophy as well as the name of his underground from Francis Parker Yockey . . . patron saint of America's neo-Nazis

> . . . . Carto was strongly influenced by Yockey . . . .

Id. at 37.

> Liberty Lobby is, in actuality, a front for Willis Carto's neo-Nazi activities.

Id., at 39.

Former Liberty Lobby insider Jeremy Horne found the following memorandum by Willis Carto:

> The strangest of all strange things and the most unfair of all unfair things brought on by Jewish control of American politics concerns the alleged recipient of buckets and buckets of hypocritical Jewish concern and sympathy - the American Negro!
>
> Jewish control or so-called Negro-organizations like the NAACP and

> the Urban League is so complete and has been identified so closely yet fraudulently in the public mind with the legitimate aims and aspirations of the American Negro that only a few white Americans realize the truth about the fantastic trickery which brought this about.
>
> Only a few Negroes are genuinely in accord with the troublemaking policies of these two race-mixing organizations. It is a sad, yet significant fact that both of these fraudulent outfits prosper by using the brains of Jews, the money of Jews and duped white Christians and the "front" of raceless mulatto figureheads. But hardly a Negro in the lot!

Id. at 121. Also in Carto's writings:

> Hitler's defeat was the defeat of Europe. And America.
>
> How could we have been so blind? The blame, it seems, must be laid at the door of the international Jews . . . . If Satan himself, with all the superhuman genius and diabolical ingenuity at his command, had tried to create a permanent element of disintegration and force for destruction of the nations, he could have done no better than to invent the Jews.

Id.

> [Carto] has, in Liberty Lobby, the nucleus for the American Reich.

Id.

> To [Carto], the words of Mein Kampf and Imperium seem quite sane. . . .

Id.

(XXVI): "The Spotlight's stock in trade are stories that purport to expose the 'Jew-Zionist' international bankers 'conspiracy against hard-working, blue-collar Americans."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon information supplied by Robert Eringer, borne out by, inter alia, an article in the June 4, 1979 issue of The Spotlight entitled, "Megabankers Control U.S. Economy by Diverting Gas to Israel." The article states:

> [T]he gas shortage choking America and raising our inflation fever has been caused by Israel. This has provided the world-wide cartel with the opportunity not only to gouge

you at the gas pump, but to seize control of the U.S. economy.

Three knowledgeable European energy experts exclusively interviewed at length by The SPOTLIGHT's investigative team in New York City and Washington confirmed unanimously that the U.S. gas crunch has been staged by Israel in cahoots with the multinational corporations which control global energy supplies.

(XXVII): "Not long ago, a free-lance reporter for The Spotlight, J. Michael Dunsmore, told The Investigator that a lead story in the May 21, 1979 issue of Carto's tabloid was a total hoax . . . . The story, written by Dunsmore under the pseudonym 'Tom Waits,' reported that a Spotlight

reporter had travelled to Baden, Austria, for an April 1979 Bilderberg Conference. But Dunsmore now says neither he nor any other reporter for the paper went to Baden and that the reported conversation with a 'Bilderberg official' never took place."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon information supplied by Robert Eringer.

(XXVIII): ". . . Liberty Lobby was fined $11,000 by the Federal Election Commission. The FEC charged that The Spotlight articles expressly advocated the defeat of a clearly indentified candidate (Carter) and that promotion and distribution of the article by Liberty Lobby was illegal under federal

election laws because Liberty Lobby is a non-profit corporation."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the June 4, 1979 issue of The Spotlight which stated, on page 23, "Currently, the FEC [Federal Election Commission] is demanding that The SPOTLIGHT and Liberty Lobby pay an $11,000 fine for the 'no-no' of telling the truth about Jimmy Carter."

(XXIX): "Carto reportedly delivered a speech in which he attempted to emulate Hitler's style and charisma, and joined the audience in singing Hitler's 'Horst Wessel Lied."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in making the above statement:

> Horst Wessel Lied" was sung after a buffet supper on January 25, 1969. Carto then gave an anti-Semitic speech to the gathering of Nazi sympathizers.

Simonds, supra, at 986.

> At a party given in his [Carto's] honor by the Francis Parker Yockey Movement, guests wore Nazi insignia, sang the 'Horst Wessel Lied' . . .

Mermelstein v. Institute for Historical Review, Declaration of William Cox, supra, at 11.

> At one NYA [National Youth Alliance] organizational party in honor of Carto, Nazi emblems were openly displayed and Hitler's Horst Wessel was sung by the guests.

120 Cong. Rec. E 4841 (daily ed.), July 18, 1974 (extension of remarks of Rep. Eilberg).

> On January 25, 1969, at a National Youth Alliance Meeting in Monroeville, Pennsylvania, Nazi emblems were displayed and Hitler's "Horst Wessel Lied" was sung. In the words of one observer, "Carto tried to emulate the personal habits that Hitler had become famous for. . . . To his attentive listeners, he was Hitler reincarnated.

Trento & Spear, supra, at 124.

(XXX): "Willis Carto once wrote that he organized Liberty Lobby to clean 'the Augean stables' and re-establish a government 'in consistency with American traditions.' But surely what Willis Carto perceives as 'American traditions'

are not the traditions the late Adlai Stevenson had in mind when he said: 'What can we say for the self-styled patriot who thinks that a Negro, a Jew, a Catholic or a Japanese-American is less an American than he?'"

Plaintiffs allege this statement to be false and defamatory.

Defendants relied, inter alia, upon the following in making the above statement:

> Carto, in a letter to an associate concerning a new tabloid, stated: "I think there should be more stuff in it about the Wall Street jew . . . ." Concerning underground newspaper editors of the left pictured in Time, Carto stated, "[e]ach of them was a particular type of Jew."

Id., at 989.

> Carto is involved in the publication of racist and anti-Zionist literature.

"Power Base for Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," Washington Post, May 16, 1977, at p.A-1.

> The money trees of which Willis Allison Carto is the creator and proprietor constitute a deep but not impenetrable forest, at the center of which is the tangled underbrush of a secret American Nazism.

Mermelstein v. Institute for Historical Review, Declaration of William Cox, at 2.

> The racism of the most visible Carto organizations is masked by an apparent respectability. . . . Achieving white Anglo-Saxon

> supremacy is, for Willis Carto, a 'positive' cause of war.

Id., at 3.

> In fact, Willis Carto has goals more far-reaching than propaganda and persuasion. The Institute [i.e. for Historical Review] is but one arm of an organized, nationwide campaign of anti-Semitism and racism that has as its ultimate objective domination by a pure 'Aryan' race of all North America and all Europe under the leadership of Willis Allison Carto.

Id at 4."

> Under Carto's guidance the American Mercury . . . was turned into a thoroughly scruffy facist [sic] and anti-Semitic magazine . . . .

Id at 7.

> Yockey, like Carto, declared that Hitler and Germany failed in their historic mission because of the Jews. Yockey suggested, also like Carto, that with a new hero, a Hitler reborn, an American majority can be forged to triumph where Hitler failed.

Id., at 9.

> . . . crypto-Nazis of Carto's immediate circle.

Id., at 14."

> the first Nazis, the men Willis Carto admires most.

Id., at 16.

> It is Willis Carto's self-decreed mission to multiply into a majority the number of Americans who share that Hitlerian concern, [of the

"niggerfication of America," (Carto's words)].

Id., at 24-25.

Willis Carto leads organized anti-Semitism in the United States. His dream is to succeed the Fuehrer as savior of the 'Aryan race' in America and Europe.

Id., at 25.

The following is taken from 120 Cong. Rec. E. 4841 (daily ed.), July 18, 1974 (extension of remarks of Rep. Eilberg):

An outspoken anti-Semite who has professed an abiding admiration for Hitler and Nazi Germany and has been the moving force behind a network of Jew-hating organizations and publications over the years is also the unpublicized force behind

"This Is Liberty Lobby," an extremist radio program carried five times a week by some 126 stations around the country.

His name is Willis A. Carto.

* * *

Liberty Lobby was founded as a front for the seamier operations of Carto,among them Liberty and Property, a clearinghouse for keeping informed on anti-Semitic activities; Western Destiny, a magazine which published racist, Nazi-type articles, and Noontide Press, publisher of anti-Semitic, racist, and pro-Nazi books - including "Imperium," by the late Nazi apologist Francis P. Yockey, a book containing a dedication to Adolph

Hitler and a laudatory 35-page introduction by Carto himself.

Carto, 47 years old, began to work full time as a professional bigot and organizer in 1954 when he became executive secretary of Liberty and Property. A racist, as well as an anti-Semite, he complained while working for Liberty and Property, that "only a few Americans are concerned about the inevitable niggerfication of America." His 20-year career includes serving as a director of Congress of Freedom a right-wing, racist organization, and as an organizer for the John Birch Society.

In 1966, Carto took over the venerable American Mercury name and

placed it on the masthead of a quarterly devoted largely to anti-Jewish hate and issued in tandem with the semi-monthly Washington Observer Newsletter, similarly laden with unvarnished anti-Semitism.

* * *

In a 1967 U.S. Court of Appeals case brought by Liberty Lobby against columnist Drew Pearson -- which Liberty Lobby lost -Judge Warren E. 8urger (now Chief Justice of the U.S. Supreme Court) said the organization's activities reveal "overtones of anti-Semitism and racism." [See Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 n.7 (1968).]

* * *

In 1971, Liberty Lobby published a 40-page pamphlet, "America First," ostensibly an analysis of Middle East problems.

* * *

[T]he pamphlet is a tirade of hate blaming the Jews not only for Middle East crises, but for the crucifixion of Jesus, the Russian Revolution, and the two world wars. It questions the allegiance of American Jews and suggests that the only Jews who are loyal Americans are those few who are openly pro-Arab.

* * *

Years ago, Carto wrote to a fellow rightist, Norris Holt: "Hitler's defeat was the defeat of Europe. And America . . . . The

> blame must be laid at the door of the international Jews."
>
> Carto has been associated with "anti-Semitic" and far rightist groups.

Schrag, "America's Other Radicals," Harper's, August, 1970, at 44.

> Carto sees his media empire as a means of obtaining political power in order to effectuate his policies of racism.

Mermelstein v. Institute for Historical Review, Supplemental Points and Authorities and Argument Regarding Corporate Liability (dated Aug. 10, 1981), at 15.

> Carto is "a self-avowed admirer of Adolf Hitler."

Chandler, "'Debunkers' of Holocaust Linked to Right-Wing Extremists," Los Angeles Times, May 3, 1981.

> 'Carto wants a nationalist socialist dictatorship' in the United States, a former Liberty Lobby executive told a reporter.

Id.

> Willis Carto is a known admirer of Adolf Hitler.

Brin, "Propagandists Libel Holocaust at U.C.L.A.," Orange County Jewish Heritage, March 13, 1981.

> [B]ehind the scenes, and often far away (Los Angeles), there is a more elusive figure - with a passion for anonymity who is the real boss of Liberty Lobby . . . . Carto . . . has also maintained significant ties with the demi-world of anti-Semitic propagandists in America.

"Facts," at p. 459, July, 1968, (ADL of B'nai B'rith, vol. 18, no. 2).

Carto has a "vision of a fascist future." Trento and Spear, supra, at 36.

> Through the Noontide Press in Sausalito, California, Carto publishes books which mock the Jews and extol Aryan culture.

Id.

> [T]he real insiders in Carto's apparatus belong to an explicitly Nazi group called the Francis Parker Yockey movement. . . . [T]he Movement amounts to an underground which controls [Carto's] . . . other fronts and whose members flaunt swastikas, sing Nazi songs and quote Nazi slogans.

Id.

> Carto tells "his intimates" that "[t]he problems of our civilization

> . . . are the fault of Jews and Negroes."

Id.

> Carto has taken his philosophy as well as the name of his underground from Francis Parker Yockey . . . patron saint of America's neo-Nazis . . . . Carto was strongly influenced by Yockey . . . .

Id. at 37.

> Liberty Lobby is, in actuality, a front for Willis Carto's neo-Nazi activities.

Id., at 39.

Former Liberty Lobby insider Jeremy Horne found the following memorandum by Willis Carto:

> The strangest of all strange things and the most unfair of all unfair things brought on by Jewish control

of American politics concerns the alleged recipient of buckets and buckets of hypocritical Jewish concern and sympathy - the American Negro!

Jewish control of so-called Negro-organizations like the NAACP and the Urban League is so complete and has been identified so closely yet fraudulently in the public mind with the legitimate aims and aspirations of the American Negro that only a few white Americans realize the truth about the fantastic trickery which brought this about.

Only a few Negroes are genuinely in accord with the troublemaking policies of these two race-mixing organizations. It is a sad, yet

> significant fact that both of these fraudulent outfits prosper by using the brains of Jews, the money of Jews and duped white Christians and the "front" of raceless mulatto figureheads. But hardly a Negro in the lot!

Id. at 121. Also in Carto's writings:

> Hitler's defeat was the defeat of Europe. And America. How could we have been so blind? The blame, it seems, must be laid at the door of the international Jews . . . . If Satan himself, with all the super-human genius and diabolical ingenuity at his command, had tried to create a permanent element of disintegration and force for destruction of the nations, he

could have done no better than to invent the Jews.

Id.

Source Demonstrating that Plaintiffs Should Have Known Since 1969 of the Alleged Theft of the Records Identified in Count II of the Complaint

Carto devised a system for controlling congressmen. Mrs. Sarah Shields Jobe, 77, once a prominent southern attorney, describes the system, which she unwittingly helped construct: "Carto asked me to do some research on a number of congressmen. He asked me to find out what secret organizations they belonged to. He asked me to find out if they were members of the Ku Klux Klan or the White Citizens Council. He called the file 'Kosher Konservative Kongressmen'

-- or the KKK file. I guess he had 52 people in there. As time went on I learned that Carto was a Nazi and what he was using Liberty Lobby for. He was making a concerted effort to take over the conservative element of Congress via blackmail."

Like Jeremy Horne, Mrs. Jobe was a responsible conservative, concerned that Liberty Lobby subscribers were being defrauded. She carted off Carto's files, which have been made available to True.

Trento & Spear, supra, at 122.

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CLERK

(3)

NO. 84-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

– against –

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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12 pp

QUESTIONS PRESENTED

1. Was the Court of Appeals correct in stating that the "clear and convincing" standard of proof of actual malice in a public figure libel action should not be applied in deciding a defendant's motion for summary judgment?

2. Was the Court of Appeals correct in holding that the "libel proof" doctrine is inapplicable to the respondents?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. Liberty Lobby, Inc. is a nonprofit District of Columbia corporation. It is affiliated with Cordite Fidelity Corporation, a District of Columbia corporation.

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No. 84-1602

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents, Liberty Lobby, Inc. and Willis A. Carto, respectfully oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on November 2, 1984.

OPINIONS BELOW

JURISDICTION

STATUTORY PROVISION INVOLVED

Respondents accept the Petitioners' statements on these points.

STATEMENT OF THE CASE

The Respondents accept the Statement of the Case presented by the Petitioners, with the following exceptions and additions:

The publications of the Petitioners did not recount "the history and views" of the Respondents. (*Petition*, p. 6.) The publications were filled with falsehoods and distortions which presented an extremely inaccurate and damaging picture of the Respondents.

The Petitioners' publications went beyond falsely calling the Respondents neo-Nazi, fascist, anti-Semitic, and racist. (*Petition*, p. 6.) Petitioners also made the following maliciously false assertions, all of which have been ordered by the Court of Appeals to be tested before a jury in a libel trial: that Respondent Carto owns a company which is paid $6,000 rent per month by Respondent Liberty Lobby, Inc. (*Appendix to Petition*, p. 67-a); that Carto created an organization whose purpose was the forced deportation of American blacks to Africa (*Id.* at 69-a); that Carto looks like and imitates Adolf Hitler and joined in the singing of the "Horst Wessel Lied" (*Id.* at 71-a); that Carto conducts his business from a public telephone booth (*Id.* at 72-a); that a Carto organization supported G. Gordon Liddy's Congressional campaign (*Id.*); that Carto secretly observes prospective employees through a one-way mirror (*Id.*).

Petitioners also neglect to reveal that they relied on a virtually unknown informant for a number of their false statements about the Respondents. (*Id.* at 73-a-75-a.)

An employee of Petitioner Anderson, Joseph Spear, assigned and supervised the writing of the Petitioners' defamatory publications concerning the Respondents. It was this same Joseph Spear who in 1969 had co-authored an article in *True* magazine about the Respondents. The *True* article was a malicious attack on the Respondents, containing numerous false statements. The resulting libel suit was settled when *True* paid Carto a sum of money and published a favorable article about Liberty Lobby in *True*. When Spear assigned Charles Bermant to write the articles for *The Investigator* which brought about the present lawsuit, Spear gave Bermant the statements which had been made in the first *True* article from which to work. Bermant used some of those statements as the sole source for some of his statements in *The Investigator* articles. (*Id.* at 8-a-10-a.)

William McGaw, editor of *The Investigator*, told the magazine's president, prior to publication of the articles about the Respondents, that the articles were "terrible" and that the illustrations "could be libelous." (*Id.* at 13-a.)

Petitioners, on pages 8 and 9 of their Petition, give a misleading summary of the Court of Appeals opinion when they say that the Respondents, public figure libel plaintiffs, "would be excused from meeting" the "convincing clarity" standard of proof of actual malice at the summary judgment stage. The Court of Appeals did not "excuse" the Respondents from anything; the Court held that there was no duty—and could not reasonably be—for a libel plaintiff to meet the "clear and convincing" standard prior to presentation of all evidence at trial.

REASONS WHY PETITION SHOULD BE DENIED

1. The Court of Appeals was correct in holding that a District Court judge should not apply the "clear and convincing" standard of proof of actual malice in deciding a motion for summary judgment in a libel suit, and there is no real conflict between that holding and the positions of other circuit courts.

It is settled that at the trial of a libel action a public figure must prove actual malice with "convincing clarity." The Petitioners, however, would have this very demanding standard imposed on the libel plaintiff at the summary judgment stage—an illogical, impracticable, and unjust suggestion which the Court of Appeals correctly rejected.

The Petitioners repeatedly but falsely imply that the Court of Appeals was undertaking some reckless innovation when it said that the "clear and convincing" standard of proof could not be applied to the plaintiff's evidence on a defendant's motion for summary judgment. The Petition states that the Court of Appeals "invented" a "bifurcated burden of proof" (p. 19) and "created a special limitation" (p. 21).

On the contrary, the Court of Appeals was merely adhering to proper summary judgment principles, and it is the Petitioners who are advocating a novel precept which (though obviously helpful to them in this case) would if adopted stand the rational order of things on its head and make it virtually impossible for any public figure libel plaintiff to get to trial. The plain fact is that the Petitioners' notion would force the entire case to be tried before trial. A District Court judge cannot possibly evaluate whether a plaintiff can prove actual malice by clear and convincing evidence until the judge has seen all the evidence, and has heard and observed the witnesses. The opinion of the Court of Appeals in this case argues this point most effectively.

(*Appendix to Petition*, pp. 28-a-32-a.)

The issue of actual malice is a largely factual question which can reasonably be decided only after the plaintiff has had a chance to present all his evidence to a trier of fact. This Court has never implied otherwise. Indeed, this Court has said that "proof of 'actual malice' does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 & n.9 (1979).

Bose Corp. v. Consumers Union of the United States, Inc., _____ U.S. _____, 104 S.Ct. 1949 (1984), prominent in the Petition before this Court, deals with appellate review of defamation judgments entered after trial before a trier of fact and has nothing to do with summary judgments.

The Petitioners maintain erroneously that the Court of Appeals in this case is in conflict with other circuits. In fact the Petitioners make the remarkable statement that the Court of Appeals "stands in open conflict . . . with other courts which have continued routinely to apply the 'clear and convincing' standard at the summary judgment stage just as it is applied at trial or on motion for directed verdict . . ." (*Petition*, pp. 16-17.)

There is no evidence in the cases cited by Petitioners that "other courts" have actually applied the standard at all, much less "routinely." Petitioners rely heavily on *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2nd Cir. 1980), which in turn repeatedly relies on Nader v. de Toledano, 408 A.2d 31 (D.C. App. 1979). *Yiamouyiannis* is apparently self-contradictory. First that court approvingly quotes *Nader v. de Toledano* as saying that "the same principles applicable to normal summary judgment motions are applicable to such motions when made in a public figure libel action." (619 F.2d at 939.) Then the *Yiamouyiannis* court said that a judge in denying a defendant's summary judgment motion must con-

clude that a reasonable jury "could" find malice with convincing clarity. (*Id.* at 940). The *Yiamouyiannis* court then went on to rest its decision on a lesser standard than "convincing clarity," saying that "no showing has been made that the [allegedly defamatory statements] were published with actual malice, let alone a showing that achieves 'convincing clarity.' (*Id.* at 942.)

Both *Yiamouyiannis* and *Nader* are easily distinguishable on both law and facts from the present case. In *Westmoreland v. CBS, Inc.*, 596 F.Supp. 1170, 1177 (S.D.N.Y. 1984), it was stated that the *Yiamouyiannis* statement about "convincing clarity" and summary judgment "is a *dictum* that seems to overlook an important distinction . . ." [Emphasis supplied.]

The other cases cited on pages 17 and 18 of the Petition are devoid of relevancy to the question raised here.

It appears that the Court of Appeals in the present case would have reversed the District Court no matter which standard of proof was applied, simply because there were important unresolved issues of fact relating to the question of actual malice, but it is also clear that the Court of Appeals' position on the standard of proof to be used on summary judgment is correct and is not in conflict with the holdings of other circuits.

2. The Court of Appeals was correct, and was in agreement with the other circuits, in holding the "libel proof" theory inapplicable to the facts of this case.

The "libel proof" doctrine was not even reached by the District Court in rendering summary judgment, and when Petitioner nevertheless raised it at the appellate level the Court of Appeals disposed of it in no uncertain terms.

There is no issue here. The Petitioner has presented no

evidence that the Court of Appeals was incorrect or was in conflict with other circuits. Respondents rely on Judge Scalia's eloquent discussion of this point to refute Petitioners' argument—a discussion crowned by the statement, "We are not yet ready to adopt for the law of libel the principle that 10,000 repetitions are as good as the truth. We see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth." (*Appendix to Petition,* p. 16-a.)

The Court, in essence, held that the door to an American courthouse should not be barred to anyone due to the unpopularity of his political views. In an effort to obfuscate this essential principle and to prejudice the courts against the plaintiff the defendant has relied upon false assertions made by the Anti-Defamation League of B'nai B'rith (ADL), a private hearsay-gathering organization which regularly makes allegations with confident assurances even when those assertions are lacking in truth. It is only at a trial of these issues that the truth or falsity of the ADL-based allegations can be tested by legal process.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

May 8, 1985

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No. 84-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

— v. —

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

On Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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Petition For Certiorari Filed April 9, 1985
Certiorari Granted June 3, 1985

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APPENDIX A

Docket Sheet — *Liberty Lobby v. Anderson*, No. 81-2240 (D.D.C. filed Sept. 15, 1981)

PARKER, J.

Plaintiffs	*Defendants*
LIBERTY LOBBY, INC.	1. JACK ANDERSON
WILLIS A. CARTO	2. THE INVESTIGATOR PUBLISHING COMPANY
	3. BILL E. ADKINS
	4. WILLIAM C. McGAW
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Date	*NR.*	*Proceedings*
1981		
Sept 15	1	COMPLAINT; appearance; jury demand; attachment A.
Sept 15		SUMMONS (5) issued.
Sept 25		SUMMONS (3) issued.
Sept 29	2	REQUEST for order appointing special process server and order appointing Peter Reynolds to serve summons and complaint upon Jack Anderson.
Oct 8		SUMMONS (3) issued:
Oct 14	3	AFFIDAVIT of service of summons and complaint on deft. William C. McGaw by certified mail on 9/21/81; attachment.
Oct 14	4	AFFIDAVIT of service of summons and complaint on deft. Jay J. Armes by certified mail on 9/26/81; attachment.

Date	*NR.*	*Proceedings*
1981		
Oct 20	5	REQUEST of pltff. for order appointing special process server and order appointing Travis McCoy to serve summons and complaint on deft. Jack Anderson and The Investigator Publishing Co.
Oct 20	6	STIPULATION of pltfs. and defts. Investigator Publishing & Bill Adkins re time to respond to complaint.
Oct 20	7	ORDER allowing defts. Investigator Publishing & Bill Adkins until Nov. 13, 1981, in which to respond to complaint. (N) PARKER, J.
Oct 20	8	STIPULATION of pltfs. and deft. Jay Armes re time to respond to complaint. Order approving stipulation and allowing deft. Armes until Nov. 13, 1981, in which to respond to complaint. (N) (Fiat) PARKER, J.
Oct 27	9	AFFIDAVIT of service of summons and complaint on defts. Bill E. Adkins, and Bill E. Adkins on 9/23/81; attachment.
Oct 27	10	NOTICE of dismissal as to William C. McGaw with prejudice.
Oct 28		DEPOSITION of William C. McGaw on behalf of defts.
Nov 2	11	NOTICE by pltf. of dismissal of Jay J. Armes. CD/N
Nov 12	12	AFFIDAVIT of service of summons and complaint on deft. Jack Anderson on 11/10/81.
Nov 13	13	MOTION of defts. to dismiss Count I; MEMORANDUM in support of defts. motion to dismiss Count I of the complaint; affidavit; Exhibits A-J.
Dec 16	14	STIPULATION with approval of the Court allowing plfts. until Dec. 24, 1981 in which to file an opposition to the motion to dismiss and allowing defts. until Jan. 8, 1982 in which to file a reply. (Fiat) (N) PARKER, J.

Date	*NR.*	*Proceedings*
1981		
Dec 30	15	STIPULATION extending time until 1/11/82 for pltffs. to file opposing points and authorities to defts. motion to dismiss; and defendants to reply by 1/25/82. (Approved) (Fiat) (N) PARKER, J.
1982		
Jan 6	16	NOTICE by pltffs. to take deposition of Sarah S. Jobe.
Jan 18	17	POINTS and authorities by pltffs. in opposition to defts. motion to dismiss Count I of the complaint; affidavit. "Let this be filed" (fiat) (Signed 1/15/82) PARKER, J.
Feb 5	18	FIRST request by pltffs. for production of documents by the defts.
Feb 5	19	FIRST set of interrogatories by pltffs. to deft. Jack Anderson.
Feb 5	20	FIRST set of interrogatories by pltffs. to the Investigator Publishing Co., Inc.
Feb 5	21	NOTICE by pltffs. to take deposition of Jack Anderson.
Feb 9		ORAL DEPOSITION of Sarah S. Jobe on behalf of pltff.; Exhibits.
Mar 18	22	ANSWERS of deft. Jack Anderson to pltffs. first set of interrogatories.
Mar 18	23	ANSWERS of defts. The Investigator Publishing Company to first set of interrogatories.
Mar 19	24	OBJECTION of defts. to document request.
May 17	25	ORDER denying motion of deft. to dismiss or, in the alternative, for summary judgment. (N) PARKER, J.
May 17	26	ORDER that all discovery shall be completed by 9/30/82; setting a status call for 10/15/82 at 9:30 a.m. in Courtroom No. 19; setting a pretrial on 10/29/82 at 9:00 a.m. and trial on 11/15/82 at 9:30 a.m. (N) PARKER, J.

Date	*NR.*	*Proceedings*
1982		
May 26	27	ANSWER and counterclaim of deft. to the complaint.
Jun 2	28	MOTION of pltffs. to compel answers to first sets of interrogatories, and questions propounded during deposition of Jack Anderson; statement of points and authorities.
Jun 4		DEPOSITION of Jack Anderson taken on 4-12-82 for pltf.; Volume I; errata.
Jun 18	29	REQUEST by defts. for admissions.
Jun 18	30	MOTION by pltffs. to dismiss counterclaim; memorandum.
Jun 24	31	MOTION of defts. for enlargement of time to file oppositions to the motion to compel discovery and the motion to dismiss the counterclaim; memorandum; affidavit of David J. Branson; Exhibit 1.
Jun 28	32	MOTION of defts. to enlarge the time established for completion of discovery; P&A's; affidavit of David J. Branson.
Jun 28	33	ORDER allowing deft. until 7/19/82 to file their opposition to pltf. motion to compel discovery and pltf motion to dismiss counterclaim. (N) PARKER, J.
Jul 9	34	FIRST set of interrogatories by defts. to pltffs.
Jul 14	35	RESPONSE of pltffs to defts request for admissions.
Jul 15	36	ORDER granting motion of defts. for an enlargement of time; directing defts. to file a motion for summary jdugment on or before 8/13/82; pltf. shall respond on or before 9/3/82; and discovery is extended to 10/15/82. (N) PARKER, J.
Jul 19	37	SUPPLEMENTAL answers of defts. to first set of pltffs interrogatories to the Investigator Publishing Company.

Date	*NR.*	*Proceedings*
1982		
Jul 19	38	SUPPLEMENTAL answers of defts. to first set of pltffs interrogatories to Jack Anderson.
Jul 19	39	OPPOSITION of counterclaim-pltff. to motion to dismiss counterclaim; memorandum.
Jul 19	40	OPPOSITION of defts. to motion to compel discovery; memorandum.
Jul 30	41	STATEMENT of points and authorities by pltffs. in reply to defts opposition to motion to compel discovery; Exhibit A; supplement to motion to compel answers to pltffs first sets of interrogatories and questions propounded during deposition of Jack Anderson.
Aug 10	42	NOTICE by Pltffs. to take deposition of Scott Stanley.
Aug 13	43	MOTION of defts. to enlarge time to move for summary judgment; P&A's.
Aug 17	44	ORDER directing defts. to file a motion for summary judgment on or before August 19, 1982 and directing pltffs. to respond on or before 9/9/82. Discovery shall be completed by Oct. 15, 1982. (N) PARKER, J.
Aug 17	45	ORDER referring all outstanding discovery matters to the U.S. Magistrate for resolution. (N) PARKER, J.
Aug 19	46	MOTION of defts. for summary judgment; memorandum; affidavit of Charles Bermant.
Aug 23	47	SUPPLEMENTAL answer of pltffs. to interrogatory Number 5 of defts. first set of interrogatories; attachments.
Aug 23	48	ANSWERS of pltffs. to first set of interrogatories by defts.; Exhibits.
Aug 23	49	NOTICE by pltffs. to take deposition of Vincent Drosdick.
Aug 24	50	STATEMENT of material facts by defts.
Aug 27	51	NOTICE by pltffs. to take deposition of John Obert.

Date	*NR.*	*Proceedings*
1982		
Aug 30	52	ORDER granting motion of pltfs. to dismiss the counterclaim of deft. Jack Anderson and dismissing the counterclaim. (N) (Signed 8/26/82) PARKER, J.
Sept 2	53	NOTICE by pltffs. to take deposition of William Cox.
Sept 7	54	MOTION of pltffs. to enlarge time established for filing opposition to defts. motion for summary judgment with incorporated points and authorities.
Sept 7	55	OPPOSITION of defts. to pltffs. motion to enlarge time.
Sept 8	56	ORDER granting pltffs. motion for extension of time to 10/10/82 to oppose defts. motion for summary judgment. (N) PARKER, J.
Sept 14	57	SECOND request by pltffs. for prduction of documents by the defts.
Sept 14	58	MEMORANDUM OPINION and Order filed 9/13/82 denying pltfs. request for costs and attorneys fees. (N) BURNETT, Mag.
Sep 27	59	NOTICE of defts to take the deposition of Scott Stanley.
Sep 27	60	MOTION of defts for a proetective order.
Sep 27	61	SUPPLEMENTAL ANSWERS of deft Anderson to pltffs' first set of interrogatories.
Sep 27	62	REPSONSE of defts to pltffs' second request for production of documents.
Sep 27	63	SUPPLEMENTAL ANSWERS of defts to pltfs' interrogatories.
Oct 7	64	STATEMENT OF P&A's of pltffs in opposition to defts' motion for a protective order; authorities.
Oct 12	65	OPPOSITION of pltffs to defts motion for summary judgment; Exhibits; statement of genuine issues; affidavit of Willis A. Carto; Exhibit A,B.

Date	NR.	Proceedings
1982		
Oct 14	66	ORDER filed 10/12/82 denying defts motion for a protective order. (N) BURNETT, Mag.
Oct 14	67	MOTION of pltffs to strike; statement of points and authorities.
Oct 14	68	NOTICE by pltffs of filing; table of cases.
Oct 15		STATUS CALL: Motion for summary jdugment is submitted on the pleadings. If the court requires oral argument, counsel will be notified. The Court vacates the pretrial and trial dates of 10/29/82 and 11/15/82. (Rep: E. Olsen) PARKER, J.
Oct 20		DEPOSITION of Vincent A. Drosdik, III on behalf of pltffs taken on 8/27/82.
Oct 20		DEPOSITION of Charles Bermant on behalf of pltffs taken on 8/20/82.
Oct 25		TRANSCRIPT OF PROCEEDINGS, Oct. 15, 1982, courts copy; pages 1-15; Rep: E. Olsen.
Oct 26	69	OPPOSITION of defts. to motion to strike; memorandum.
Oct 29	69a	REPLY MEMORANDUM by defts. in support of motion for summary judgment; affidavit
Nov 12	70	MOTION of pltffs. for time and leave to serve a response to the "reply memorandum in support of defts motion for summary judgment with incorporated points and authorities.
Nov 12	71	MOTION of pltffs. to strike affidavit of Winfield Scott Stanley, Jr.; statement of points and authorities; affidavit; memorandum of law.
Nov 23	72	OPPOSITION of defts. to motion to strike the affidavit of Winfield Scott Stanley, Jr.; memorandum.
Nov 23	73	OPPOSITION of defts. to motion for time and leave to file a response to defts reply memorandum; memorandum.

Date	NR.	Proceedings
1982		
Nov 30	74	NOTICE of filing by pltffs; Original transcript of the deposition of William Cox taken by G. G. Bauman on 10/14/82.
Nov 30	75	NOTICE of filing by pltffs; Deposition of Winfield Scott Stanley, Jr. on behalf of pltffs taken on 8/20/82.
1983		
Mar 2	76	RENEWAL by pltffs. to motion to compel answers to interrogatories and to award expenses; statement of P&A's; affidavit in support; Exhibits A & B.
Mar 16	77	OPPOSITION by defts. Jack Anderson, The Investigator Publishing Company and Bill Adkins to renewal of motion to compel discovery; memorandum in support.
Apr 1	78	MEMORANDUM ORDER filed 3-30-83 denying motion of Liberty Lobby and Willis Carto to strike the affidavits of Charles Bermant and Winfield Scott Stanley. (N) PARKER, J.
Apr 1	79	MEMORANDUM OPINION filed 3-31-83. (N) PARKER, J.
Apr 1	80	ORDER filed 3-31-83 granting defts' motion for summary judgment; entering judgment for the defts; and dismissing the complaint with prejudice. (N) PARKER, J.
Apr 27	81	NOTICE OF APPEAL by pltffs from order entered 4-1-83; $5.00 USDC fee and $65.00 USCA fees paid and credited to U.S. Treasury; copies of notice sent to: David J. Branson, Esq.
Apr 28		COPY of Notice of Appeal and docket entries transmitted to USCA; USCA# 83-1471.
Jun 3		RECORD ON APPEAL transmitted to USCA; receipt acknowledged 6-3-83.

Date	*NR.*	*Proceedings*
1985		
Feb 27	82	CERTIFIED copy of Judgment dated 11/2/84 from USCA that judgment of District Court is affirmed in part, reversed in part, and this case is remanded for further proceedings in consistent with the opinion; opinion attached. (mn)
Feb 27	83	CERTIFIED copy of order dated 11/2/84 from USCA amending opinion dated 11/2/84.(mn)
Mar 19	84	TRANSMITTAL LETTER FROM USCA returning 2 volumes original record; 1 volume of transcript under 1 separate cover; 7 vols. of depositions; 1 folder with black binding (containing affidavit of Charles Berment) dated 6/3/83. (mf)

APPENDIX B
COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC.
300 Independence Avenue, S.E.
Washington, D.C. 20003
(202) 546-5611

WILLIS A. CARTO
32646 Coastsite Drive, Apt. F.
Rancho Palos Verdes, CA 90274
(213) 377-0589

Plaintiffs.

vs.

CIVIL ACTION
NO. 81-2240

JACK ANDERSON
7810 Kachina Lane
Bethesda, Maryland 20034

THE INVESTIGATOR PUBLISHING COMPANY
1717 Montana Avenue
El Paso, Texas 79902

BILL E. ADKINS
1717 Montana Avenue
El Paso, Texas 79902

WILLIAM C. McGAW
1717 Montana Avenue
El Paso, Texas 79902

JAY J. ARMES
1717 Montana Avenue
El Paso, Texas 79902,

Defendants.

Filed
Sept. 15, 1981

COMPLAINT
(FOR LIBEL AND CONVERSION)

1. This Court has jurisdiction under Title 28 United States Code §1322 and under Section 13-423 of the District of Columbia Code.

2. Plaintiff Willis A. Carto is, and was at all times pertinent hereto, a citizen of the State of California. He is founder and Treasurer of plaintiff Liberty Lobby, Inc.

3. Plaintiff Liberty Lobby, Inc. ("Liberty Lobby") is, and was at all times pertinent hereto, a not-for-profit corporation incorporated under the laws of the District of Columbia, with its principal offices and place of business located at 300 Independence Avenue, Washington, D.C.

4. The Investigator Publishing Company, upon information and belief, is a business corporation which is incorporated under the laws of the State of Texas and having its principal offices in El Paso, Texas. It publishes *The Investigator* magazine.

5. Defendant Jack Anderson is publisher of *The Investigator* and the author of articles for *The Investigator*. He is a citizen of the State of Maryland. He maintains an office in the District of Columbia.

6. Defendant Bill E. Adkins is President and Chief Executive Officer of The Investigator Publishing Company. He is a citizen of the State of Texas.

7. William C. McGaw is Editor of *The Investigator*. He is a citizen of the State of Texas.

8. Defendant Jay J. Armes is Chief Investigator for *The Investigator*. He is a citizen of the State of Texas.

9. All of the defendants, and each of them, at all times pertinent hereto, were agents of the others, and in preparing and publishing the defamations of the plaintiffs from which this lawsuit arises, either directly or by an agent, used real property in the District of Columbia (including offices at 1401 16th Street N.W., Washington, D.C.), and/or transacted business in the District of Columbia, and/or contracted to supply services in the District of Columbia, and caused tortious injury in the District of Columbia.

10. The primary activities involved in preparing and writing the defamatory publication from which this lawsuit arises took place within the District of Columbia.

COUNT ONE

Against All Defendants

11. Plaintiffs here reallege and incorporate the allegations of Paragraphs 1 through 10.

12. At all times mentioned here, and since the year 1955, when it began its existence as the first citizens' lobby in the United States, plaintiff Liberty Lobby has advocated and promoted patriotism, nationalism, lawfulness, protection of the national interests of the United States and the economic interests of its citizens, and strict adherence to the United States Constitution and the form of government it establishes. Public support for Liberty Lobby has grown tremendously over the years – – as measured, for example, by subscriptions to its weekly national newspaper, The SPOTLIGHT, by sales of books and silver medallions, and by growth of the audience to its daily radio news commentary, "This is Liberty Lobby." Liberty Lobby's support and survival depend upon the good reputation it enjoys as a defender of the national interests of the United States and of the constitutional form of government.

13. In the October 1981 issue of *The Investigator* magazine, an article entitled "The Private World of Willis Carto," was published and distributed throughout the United States, including the District of Columbia. The article, "The Private World of Willis Carto," appeared in *The Investigator* of October 1981 together with, and interspersed with, another article entitled "Yockey: Profile of an American Hitler," under the general heading, "America's Neo-Nazi Underground." Between the general heading and the two articles named above was an introductory section by "The Editors," headed "Did *Mein Kampf* Spawn Yockey's *Imperium*, a Book Revived by Carto's Liberty Lobby?" A copy of the material listed is annexed hereto and incorporated herein as Exhibit "A".

14. The headings quoted in the preceding paragraph, together with the introductory section, and the text and illustrations of the article, "The Private World of Willis Carto," juxtaposed with and interspersed with an article about an alleged "American Hitler," communicate a message which by its overall effect is false and defamatory as to the plaintiffs, Willis A. Carto and Liberty Lobby. In addition to the overall defamatory effect, the aforesaid headings, introductory section, and article, "The Private World of Willis A. Carto," contain the following false and defamatory matter, each quotation of which will be followed, in parentheses, with the plaintiffs' specific explanation of the matter's falsity. The page numbers refer to the October 1981 issue of *The Investigator*.

(I) Pages 20-21: "America's Neo-Nazi Underground." (This headline is false in that neither plaintiff is neo-Nazi and neither plaintiff is a member of any "underground." A reading of the subsequent text makes it clear that both plaintiffs are meant to be included in the "neo-Nazi underground.")

(II) Page 20: "But a more sinister neo-Nazi cabal, men of influence and cunning, lurk in the shadows." (False as to both plaintiffs for reasons already stated.)

(III) Page 21: "Thus Carto called his base organization the Liberty Lobby and even obtained tax-exempt status for it." (False in that Liberty Lobby has never sought nor obtained tax-exempt status.)

(IV) Page 22: "The book *Imperium*, meanwhile, is circulated only among the elect. The admiration for Francis Parker Yockey is also a secret thing, and Willis Allison Carto hides in the shadows of reclusion and anonymity." (False in that *Imperium* has long been, and continues to be, advertised to the public at large and sold to anyone who pays for a copy. Plaintiff Carto has never made a secret of his admiration for Yockey, and it is untrue that Carto "hides." The quoted passage is defamatory in that it falsely implies a secret and conspiratorial behavior by the plaintiffs designed to hide something unsavory, to keep hidden some guilt.)

(V) Page 23: "Why does the Anti-Defamation League believe Carto's 'outreach makes him the leading anti-Semite in the country'?" (Carto is not an anti-Semite.)

(VI) Page 23: And why did the late Drew Pearson describe Carto as a 'Hitler fan' and claim Liberty Lobby was 'infiltrated by Nazis who revere the memory of Hitler'?" (Carto is not a "Hitler fan," and Liberty Lobby is not and never has been infiltrated by Nazis.)

(VII) Page 23: "Everything he does seeks to destabilize society. His panic mailings, survivor-group propaganda approach creates a climate of fear and danger. And it is only within such a climate he will be able to seize the real political power he seeks." (When taken in context the quoted statements clearly refer to plaintiff Carto and mailings sent out by plaintiff Liberty Lobby. The statements are false in that Carto does not seek to destabilize society nor to create panic nor to seize political power.)

(VIII) Page 23: "Why does Scott Stanley, the managing editor of the John Birch Society's *American Opinion*, say, 'In my opinion, the preservation of anti-Semitism as a movement has occurred because of the activities of Willis Carto'?" (Scott Stanley's alleged statement is a highly damaging allegation without factual basis.)

(IX) Page 23: "Last, but perhaps most pertinent, did Willis Carto choose a neo-fascist to be his inspiration and role-model?" (Exhibit "A" as a whole makes it clear that the answer to this rhetorical question is "Yes," whereas in fact Carto never chose any neo-fascist to be his inspiration or his role-model.)

(X) Page 23: "After drifting from one right-wing group to another, he decided to organize 'a lobby for patriotism' he would call Liberty Lobby." (The passage refers to Carto, and the word "drifting" is false as regards the behavior it purports to describe, and creates a false and damaging implication.)

(XI) Page 23: "About this time, Carto moved his operations into a rented 30-room Edwardian building on the corner of Independence Avenue and Third Street in Washington, D.C. The building now is owned by the Government Educational Foundation, which charges Liberty Lobby $6,000 a month rent. The

chairman and owner of the foundation is Willis Carto . . ." (The building is not owned by the Government Educational Foundation. Liberty Lobby pays no rent for the building. Carto is neither the chairman nor the owner of Government Educational Foundation.)

(XII) Page 25: ". . . *The Spotlight*, which today boasts 335,000 readers . . ." (The SPOTLIGHT's paid subscribers number about 335,000; the number of its readers is much greater than that.)

(XIII) Page 25: "He . . . . conducts his business by way of conference calls from a public telephone. . ." (The "he" refers to Carto, who does not conduct his business from a public telephone.)

(XIV) Page 25: "In 1968, another Carto 'front' organization called United Republicans for America used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York." (Carto had no connection with United Republicans for America in 1968 and has never met G. Gordon Liddy.)

(XV) Page 25: "In the mid-Fifties, when Carto was drifting from one right wing organization to another, he . . . organized and promoted the Joint Council for Repatriation. What he meant by 'repatriation' was the forced deportation of all blacks to Africa." (The Joint Council for Repatriation never advocated the forced deportation of blacks, and Carto never meant by the word "repatriation" the forced deportation of blacks.)

(XVI) Page 25: "And Birch Society editor Scott Stanley notes that 'Whenever you find anti-Semitic literature coming from some little fly-by-night front, it seems to be associated with the Carto network.' " (The quoted statement has no foundation in fact.)

(XVII) Page 25 (Illustration): "Carto often observes interviews of prospective employees through a mirror." (The statement, and the illustration it accompanies, are fantasies which contain no element of truth.)

(XVIII) Page 25: ". . . . Jeremy Horne, a veteran member of the Liberty Lobby staff." Jeremy Horne was not a veteran member of the staff, having worked for Liberty Lobby for only a few months.)

(XIX) Page 27 (Illustration): Illustration depicting a man bearing a strong resemblance to Adolf Hitler, with Hitlerian moustache and right hand raised in the unmistakable suggestion of a Nazi salute, captioned "Carto, whose speeches were once a staple of ultra-right gatherings, no longer speaks in public." (The drawing is obviously intended to depict Carto as Adolf Hitler in order to subject him to scorn, hatred, and ridicule. The illustration is false in that it distorts Carto's features and haircut in order to make him resemble Hitler, adds a Hitlerian moustache, and depicts Carto making a Nazi salute. Carto does not wear and never has worn a moustache, and he does not make Nazi salutes. The drawing is a deliberate and malicious fraud. It is in no sense a caricature.)

(XX) Page 27: "Even more to the point, why would a man who says he is not anti-Semitic establish something called the Institute for Historical Review? The Institute, an integral part of Carto's West Coast operation, was set up to disprove that any Jews died in World War II gas chambers." (The Institute for Historical Review was set up for the general purpose of reexamining commonly accepted views and interpretations of history which may have a fallacious basis. It was not set up for the sole or main purpose of disproving that any Jews died in World War II gas chambers.)

(XXI) Page 27: "After consulting with attorney William Cox, Mermelstein filed an application with the Institute within a few weeks. But 'Brandon' stalled, saying the Institute would first examine an application from famed Nazi hunter Simon Wiesenthal. Subsequently Wiesenthal withdrew his claim, and Mermelstein waited to testify. Instead, he was told that the Institute would not take up his claim until 'later.' Angered at being put off for so long a time after having been threatened to respond immediately or suffer the consequences, Mermelstein and Cox filed a million-dollar suit against the organization, saying they would prove in court that the Holocaust was fact, not hoax." (The preceding passage falsifies the events leading up to the Mermelstein lawsuit against the Institute for Historical Review ("IHR"), as well as the nature of the lawsuit, all to the disadvantage of the IHR. The falsification damages plaintiff Carto,

and consequently Liberty Lobby, because the article in which the falsification appears alleges, a close connection between Carto and the IHR. The facts are: in sending Mermelstein an application form, the IHR was responding to a challenge to the IHR from Mermelstein which had been published in several newspapers; at the same time that he filed his application with the IHR, Mermelstein threatened to sue the IHR if "action" -- apparently review and validation of the evidence which Mermelstein said he intended to proffer -- was not taken within approximately 30 days, a condition not at all contemplated in the IHR's offer; the IHR never "stalled," but rather assured Mermelstein repeatedly that he would be given an opportunity to present his evidence under the terms of the IHR's offer; the statement that Mermelstein sued the IHR because he was "angered at being put off for so long a time" is patently untrue, in that the IHR never departed from the terms of its offer, and Mermelstein filed his lawsuit only 60 days after sending in his application. The lawsuit which Mermelstein filed is on the alleged contract and various tort allegations and is not to "prove in court that the Holocaust was fact, not hoax.")

(XXII) Page 39: "Outraged over whistle blowing by people who had worked for him, Carto turned to lie detector and voice stress tests to ensure loyalty and operational security. Each new employee now must sign that they are willing to take such tests at any time. Refusal constitutes ground for dismissal." (Employee testing was instituted as a result of thefts from Liberty Lobby, and not as a result of "whistle blowing." Refusal of a Liberty Lobby employee to take such tests does not constitute grounds for dismissal.)

(XXIII) Page 39: "Liberty Lobby often hires outside consultants to conduct interviews, with Carto watching through a one-way mirror." (The statement is completely false.)

(XXIV) Page 39: "The ADL called it a plan to establish a right-wing military dictatorship." ("Operation Survival" was not a plan to establish a military dictatorship.)

(XXV) Page 41: "In this scrutiny of Willis Carto and what he represents, five of the characteristics John Roy Carlson said identify inherent or incipient facism have manifested them-

selves in greater or lesser degree. They are; [sic] a virulant anti-Semitism to dissolve the social fabric; the pitting of group against group and race against race to weaken national unity; incessant Red-baiting to smokescreen fascist propoganda [sic]; superpatriotism and a perverted brand of nationalism; and the creation of a 'survivor mentality' to further fragment society. Three other characteristics are also evident in the Carto record; the use of lies and half-truths to win the support of the politically ignorant; adulation of Adolf Hitler; denigration of democracy and agitation for an authoritarian New Order." (The statements are false in that plaintiff Carto and his record are not described by the characteristics listed. Additionally, the characteristics or criteria are taken from a source which is notoriously unreliable and untruthful.)

(XXVI) Page 41: "*The Spotlight's* stock in trade are stories that purport to expose the 'Jew-Zionist' international bankers' conspiracy against hard-working, blue-collar Americans." (The SPOTLIGHT has never used the term "Jew-Zionist international bankers" and it has never stated or implied that an international banker's conspiracy is composed of or led by Jews or Zionists.)

(XXVII) Page 41: "Not long ago, a free-lance reporter for *The Spotlight*, J. Michael Dunsmore, told *The Investigator* that a lead story in the May 21, 1979 issue of Carto's tabloid was a total hoax. . . . The story, written by Dunsmore under the pseudonym 'Tom Waits,' reported that a *Spotlight* reporter had traveled to Baden, Austria, for an April 1979 Bilderberg Conference. But Dunsmore now says neither he nor any other reporter for the paper went to Baden and that the reported conversation with a 'Bilderberg official' never took place." (To the best of plaintiffs' knowledge and belief, the statement is false.)

(XXVIII) Page 73: . . . Liberty Lobby was fined $11,000 by the Federal Election Commission. The FEC charged that *The Spotlight* articles 'expressly advocated the defeat of a clearly identified candidate' (Carter) and that promotion and distribution of the article by Liberty Lobby was illegal under federal election laws because Liberty Lobby is a non-profit corporation." (Liberty Lobby has never been fined $11,000 or any other

sum by the Federal Election Commission. The FEC has never charged that promotion and distribution of an article by Liberty Lobby "was illegal under federal election laws.")

(XXIX) Page 73: "Carto reportedly delivered a speech in which he attempted to emulate Hitler's style and charisma, and joined the audience in singing Hitler's 'Horst Wessel Lied.' " (It is untrue that Carto ever delivered a speech in which he attempted to emulate Hitler's style and charisma, and it is untrue that Carto ever sang the "Horst Wessel Lied.")

(XXX) Page 73: "Willis Carto once wrote that he organized Liberty Lobby to clean 'the Augean stables' and re-establish a government 'in consistency with American traditions.' But surely what Willis Carto perceives as 'American traditions' are not the traditions the late Adlai Stevenson had in mind when he said: 'What can we say for the self-styled patriot who thinks that a Negro, a Jew, a Catholic or a Japanese-American is *less* an American than he?' " (The statement is untrue in that it falsely implies that the plaintiffs betray the principles of the American form of government and foster animosity toward and a desire to disadvantage Japanese-Americans, Catholics, Jews, and Negroes.)

15. The defendants falsely and maliciously caused to be published, and published, the aforesaid headings, texts, and illustrations in the October 1981 issue of *The Investigator*, with the result, pursuant to defendants' malicious intent, that their defamatory statements and intimations concerning the plaintiffs were delivered and communicated to, seen and read by, and understood as pertaining to the plaintiffs by large numbers of people throughout the United States, including the District of Columbia.

16. The defendants falsely and maliciously participated in the preparation -- including the planning, writing, illustration, and editing -- of the above-described defamatory matter. Upon information and belief, defendants The Investigator Publishing Company, Jack Anderson, Jay J. Armes, Bill E. Adkins and William C. McGaw, were primarily responsible for planning and editing all of the defamatory matter, and for preparing the introductory section under the heading, "Did *Mein Kampf* Spawn

Yockey's *Imperium*, a Book Revived by Carto's Liberty Lobby?" All of the defendants were involved knowingly and intentionally in the preparation of defamatory matter concerning the plaintiff, and they knew and intended that the defamatory matter would be communicated widely to other persons.

17. The defendants knew when preparing and publishing the aforesaid defamatory matter that it was false, or in the alternative, acted with reckless disregard of its truth or falsity, and prepared and published the defamatory matter with actual malice toward the plaintiffs.

18. In preparing and publishing the aforesaid defamatory matter, the defendants did maliciously intend to convey, and did convey, to the American community at large, including numerous persons upon whom plaintiff Liberty Lobby depends on potentially depends financially and otherwise for its existence and effective functioning, that plaintiff Carto, who founded Liberty Lobby and is its Treasurer and the Chairman of its Executive Committee, is a Nazi whose purposes are to imitate Adolf Hitler, to deport forcibly blacks from the United States, to participate in criminal conspiracies, to destroy the social fabric of the United States, to capture political power with the aim of overthrowing the constitutionally mandated form of government of the United States, and to veil has aims in secrecy, false patriotism, and phoney front groups. In preparing the publishing the aforesaid defamatory matter the defendants did maliciously intend to convey, and did convey, to the American community at lage, including numerous persons upon whom plaintiff Liberty Lobby depends or potentially depends financially and otherwise for its existence and effective functioning, that plaintiff Liberty Lobby is a tool for carrying out the purposes of defendant Carto as summarized earlier in this paragraph; that Liberty Lobby is a harmful rather than a constructive entity; that Liberty Lobby falsifies its true nature; that Liberty Lobby's publication, The SPOTLIGHT, misleads its readers with lies and deliberate fictitious stories masquerading as news, and that The SPOTLIGHT is used as an instrument for spreading panic in order to disrupt the social structure in order to prepare for an overthrow of the United States government; that Liberty Lobby is racist and anti-Semitic, and publicizes racism and anti-Semitism; that Liberty

Lobby in effect betrays its supporters, who believe it to represent genuinely patriotic, constitutional and lawful principles. All of the above-summarized assertions of the defendants are grossly and egregiously false, and are of such nature as to do untold damage to the plaintiffs. The defendants knew the damaging effect their defamatory publications would have upon the plaintiffs, and deliberately sought to increase that damaging effect in order wrongfully and wilfully to harm the plaintiffs.

19. By reason of defendant's publication of the aforesaid defamatory matter concerning the plaintiffs, the plaintiffs' honesty and integrity have been impeached, their reputations have been grievously injured, thereby exposing plaintiffs to public hatred, contempt, ridicule, and to financial injury and hindrance in the legitimate conduct of their affairs.

20. On August 28, 1981, before the October 1981 issue of *The Investigator* had been released to the public, the plaintiffs delivered to the publisher of *The Investigator*, Jack Anderson, a formal notification that the above-described defamatory matter was libelous, pointing out in detail the false statements contained in the proposed publication, and demanding that the October 1981 issue of *The Investigator* not be released to the public while it included the defamatory matter concerning the plaintiffs. The plaintiffs received no reply to their notification, and the defendants subsequently released the October 1981 issue of *The Investigator*, containing the above-described defamatory matter concerning plaintiffs, to the public.

21. By reason of the foregoing facts, plaintiffs were damaged and are each entitled to receive from all the defendants general damages of two million dollars ($2,000,000) and punitive damages of twenty-two milion dollars ($22,000,000).

COUNT TWO

Against Defendant Jack Anderson Only

22. Plaintiffs here reallege and incorporate the allegations of paragraphs 1 through 21.

23. On page 39 of the October 1981 issue of *The Investigator*, of which defendant Jack Anderson is publisher, the following statement appeared:

> Carto once instructed Sarah Shields Jobe to assemble a "KKK" (Kosher Konservative Congressmen) file that listed secret organizations to which certain Congressmen belonged. Disturbed by what she saw as the potential for blackmail, she defected, turning over several Carto files to columnist Jack Anderson's reporters.

24. Plaintiff Liberty Lobby did not know until its employees read the published confession quoted in the preceding paragraph that defendant Jack Anderson had taken possession and control of property which had been stolen from plaintiff Liberty Lobby.

25. Upon information and belief, the files were converted by the defendant Jack Anderson in the year 1966.

26. At the time the above-mentioned files were wrongfully taken by Sarah Shields Jobe and given to defendant Jack Anderson by way of his agents, the files were lawfully owned by and lawfully in the possession of plaintiff Liberty Lobby.

27. Defendant Jack Anderson did wrongfully take possession and control of the above-mentioned files and exercised a dominion over them which was inconsistent with the rights to which plaintiff Liberty Lobby was lawfully entitled. Anderson has continued to exercise such dominion to the present day.

28. The monetary value of the files was one thousand and eighteen hundred dollars ($1800.00).

29. As a result of defendant Jack Anderson's wrongful taking of the files, defendant Liberty Lobby has been deprived of the possession and use of the files since 1966, and is entitled to the value of the files, to interest of 10% per annum since 1966 on the value of the files, compounded to a total of eight thousand nine hundred and fifty-six dollars ($8956.00), and to punitive damages, on account of the wilful and knowing taking of stolen property by defendant Anderson, of one million dollars ($1,000,000.00), and to its costs, including attorney's fees, incurred in recapturing the value of the files.

WHEREFORE, plaintiff Liberty Lobby demands judgment

(a) against all of the defendants, and each of them, jointly and severally, for general damages in the amount of two million dollars ($2,000,000.00) and punitive damages in the amount of twenty-two million dollars ($22,000,000.00), plus interest and costs.

(b) against defendant Jack Anderson, one thousand and eight hundred dollars ($1800.00) for the value of the files taken, with interest compounded to seven thousand and one hundred and fifty-six dollars ($7156.00), punitive damages in the amount of one million dollars ($1,000,000.00), plus costs and reasonable attorney's fees for this portion of the Action.

AND WHEREFORE, plaintiff Willis A. Carto demands judgment against all of the defendants, and each of them, jointly and severally, for general damages in the amount of two million dollars ($2,000,000.00) and punitive damages in the amount of twenty-two million dollars ($22,000,000.00), plus interest and costs.

Dated: Washington, D.C.
September 14, 1981

Fleming Lee
Attorney for Plaintiffs
300 Independence Avenue, S.E.
Washington, D.C. 20003
Tel. (202) 546-5611.

JURY TRIAL REQUESTED.

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News Behind The News

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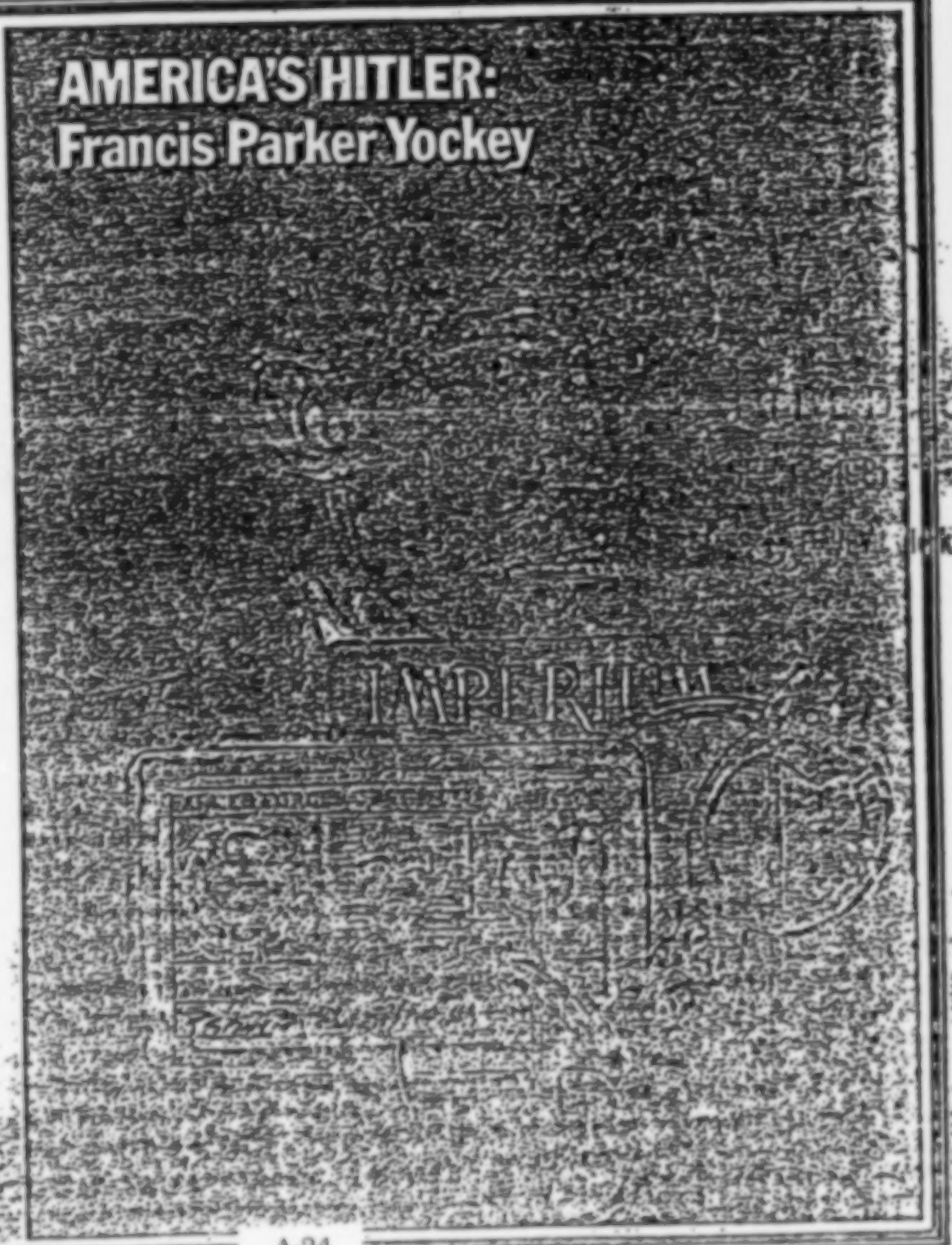

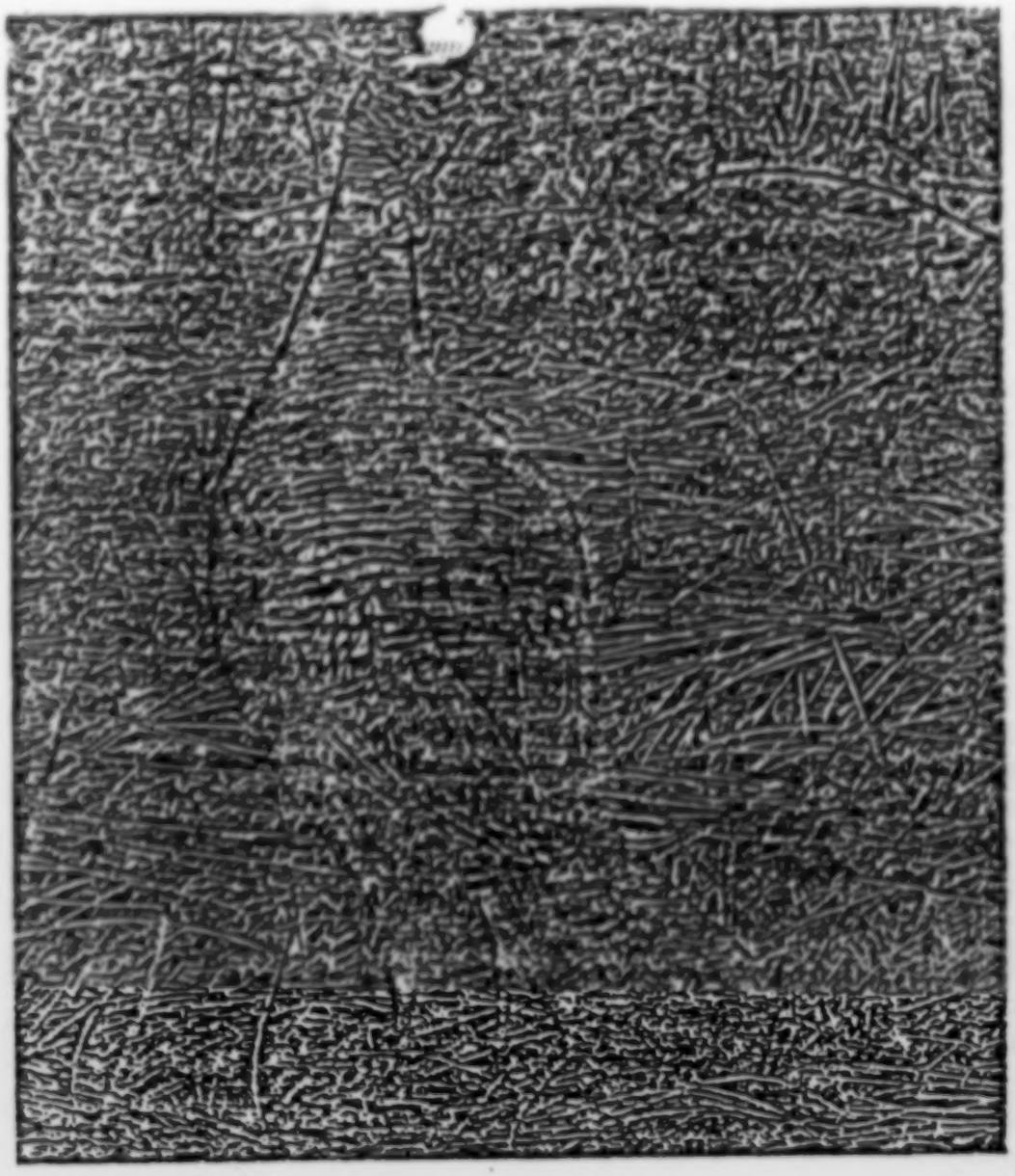

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AMER

NEO-NAZI

DID *MEIN KAMPF* SPAWN YOCKEY'S *IMPERIUM*,

The American Nazi Party, a collection of misfits and malcontents who strut around in silly uniforms, may be better suited for slapstick than subversion. But a more sinister neo-Nazi cabal, men of influence and cunning, lurk in the shadows.

They draw their inspiration from a strange book, a new *Mein Kampf*, whose strident passages cry out for a resurrection of Naziism. The book is called *Imperium*. It is dedicated to the "hero of the Second World War" who obviously is Adolf Hitler. The style is authoritative and condescending, as if mocking any reader who might dare to disagree with its conclusions.

"The soil of Europe rendered sacred by the streams of blood which have made it spiritually fertile for a millenium," declares the book, "will once again stream with blood until the barbarians and distorters have been driven out." The "barbarians" are non-Aryans, the "distorters" communists.

Like *Mein Kampf*, its latter-day sequel is viciously anti-Semitic. "The Jew is spiritually worn out," preaches *Imperium*. "He can no longer develop. He can produce nothing in the sphere of thought or research. He lives solely with the idea of revenge on the nations of the white European-American race."

Imperium was written by an American, with the unlikely name of Francis Parker Yockey. He displayed certain peculiarities that tended to raise the hair on the back of the neck. He was a disturbed man, with a streak of mysticism and a capacity to cultivate unreality. He saw himself as a hero in unheroic times, as a commander of men unhappily hemmed in by the humdrum of peace, as a visionary looking for a star of destiny.

He had a unique gift for incitement, a dark, satanic appeal that stirred others who swelled with empathetic frustration. To these conspiratorial men, Francis Parker Yockey was the last bearer of the true flame. "When I first read *Imperium*," said one, "it was like the sun rising. Yockey was the first individual to postulate a cyclical theory of history and cultures." Wrote another: "*Imperium* is prophetic, the work of an intuitive seer."

A brooding Yockey, sensing that his enemies were closing in on him, took his own life on June 17, 1960. He died in SS boots from a searing dose of potassium cyanide, Nazi-style. It was left for another to pick up the torch and fan it into a prairie fire.

His name is Willis Allison Carto. He proclaimed Yockey a martyr and published *Impe-*

Yockey: Profile of an American Hitler

BY JOHN C. OBERT

Out of the ashes of Naziism has come a book that has become the *Mein Kampf* of a neo-Nazi underground. Its adherents already control a publishing-propaganda network stretching to the far corners of America. The book presents the ideas of Adolf Hitler in quasi-sophisticated prose. Its full title is *Imperium—The Philosophy of History and Politics*.

It is the legacy of Francis Parker Yockey, whom some called brilliant and others called demented. He was a slight, dark complexioned man who served as an attorney with the War Crimes Tribunal that prosecuted Nazi leaders. He quit after 11 months because, he said, he did not believe the Nazis were getting a fair hearing. He disappeared from sight until, in the summer of 1960, he was arrested by San Francisco police. He killed himself in a San Francisco jail.

(Continued on page 22)

ICA'S UNDERGROUND

A BOOK REVIVED BY CARTO'S LIBERTY LOBBY?

rium. In a strident introduction, Carto derided "dainty combatants" who "swarm over every anti-communist movement like ants on sugar." He warned ominously: "Those who are to save the West must realize at the outset that only part of it can be saved; that much must be sacrificed and that the resulting structure will be different from the past."

He had an idea how to go about saving the West. "Although our job is to *rebuild*," he wrote, "we must not lose sight of the reality: for we cannot rebuild until we have *captured*. Political power is the essential criterion . . ."

To capture political power, Carto sought to put a benign face on his operation. He took his strategy from *Imperium*. "In one respect," he wrote, "*Imperium* is akin to *Das Kapital*, for Karl Marx gave to the conspiratorial Culture Distorter the necessary ideological mask to hide its mission of ruthless, total destruction . . . Francis Parker Yockey has done the same thing for those who are constructive-minded and who have the intellectual and moral courage to face reality and seek and speak the truth."

Thus Carto called his base organization the Liberty Lobby and even obtained tax-exempt status for it. He has now built a multimillion-dollar publishing, fund-raising, campaign-financing, mail-order and travel-club empire with headquarters on both coasts. Yet few knew his name until President Reagan's nomination of Warren Richardson for assistant secretary of health and human services ran into trouble on Capitol Hill last spring.

That nomination foundered on charges of anti-Semitism after it was revealed that Richardson had once served as general counsel to Liberty Lobby. Leading the opposition to Richardson's nomination was Rep. Samuel Gejdenson, D-N.Y., whose father had been held in a Nazi concentration camp, and Nathan Perlmutter, national director of the anti-Defamation League of B'nai B'rith.

The book *Imperium*, meanwhile, is circulated only among the elect. The admiration for Francis Parker Yockey is also a secret thing, and Willis Allison Carto hides in the shadows of reclusion and anonymity. Yet the story of these men, and the new *Mein Kampf* they produced, should be told. Herewith are our findings on the two mystery men.

—The Editors

The Private World of Willis Carto

BY CHARLES BERMANT

In the pantheon of the ultraright, dangerous demagogues are accorded equal godhood with conservative heroes. Willis Allison Carto has been called both. The sharp differences of opinion about him, along with his penchant for obscurity, beg a closer look at the man, his views and the apparatus he employs to disseminate the views. Is this crisp, fit 56-[illegible] of medium-build and [illegible]ate, the gracious, witty, erudit[illegible] bourbon-drinking personality his friends say he is? Or is he the harsh, intolerant, paranoid and puritanical martinet some of his former employees claim him to be?

More germane, is he merely an ultra-conservative whose political opinions deserve the respect accorded those of a William Buckley? Or do Carto's opinions march goose-steps beyond the pale of responsible American conser-

(Continued on page 23)

Yockey: Profile of an American Hitler

Yockey wrote *Imperium* under the name Ulick Varange (taken from the Varangians, a barbaric Viking band that introduced the Aryan race to Russia) and dedicated the book "to the hero of the Second World War." Even the conservative *National Review* found Yockey's cryptic dedication but "a veiled reference . . . to Adolf Hitler."

It is said that Yockey wrote *Imperium* in six months without notes, while secluded in Brittas Bay, Ireland. It is clearly the work of a man of considerable intellect, yet its conclusions read like a case study from Richard Hofstader's definitive analysis of modern-day, right-wing extremism, *The Paranoid Style in American Politics*, published by Knopf in 1965.

Yockey called Abraham Lincoln a charlatan for defining America as "a nation ... dedicated to the proposition that all men are created equal."

Hofstader identifies the touchstone of right-wing extremism to be an obsession with conspiracy, apocalypticism, absolutism and "a curious leap in the imagination that is always made at some critical point in the recitation of events."

The surface plausibility of extremist logic, Hofstader wrote, "lies, in good measure, in this appearance of the most careful, conscientious, and seemingly coherent application to detail, the laborious accumulation of what can be taken as convincing evidence for the most fantastic conclusions, the careful preparation for the big leap from the undeniable to the unbelievable."

Imperium is obsessed with conspiracy. Its rhetoric is apocalyptic and absolutist. It does make that curious leap in imagination from the "undeniable to the unbelievable." Yockey's ponderous scholarship lends *Imperium* a certain surface plausibility, until the reader is confronted with his bizarre conclusions. For in the final analysis, Yockey is arguing for an absolute imperialism based on an absolute politics, an imperium of Western Aryan nations united under the Hitlerian precepts of national socialism.

The conspiracy thwarting a Western Culture millenium, Yockey maintains, is led by the Culture-Distorters. And who are the Culture-Distorters? According to Yockey they are the racial and cultural misceganists, rationalists, capitalists, entrepreneurs, egalitarians, libertarians, believers in human rights and participatory democracy, and, above all, communists and "the Church-State-Nation-People-Race of the Jew."

Under the Imperium that he envisaged, "Public power can no longer be held by individuals; enterprises pass under public control and ownership; the money-monopoly of a few individuals is transferred to the State . . . With the coming of the Age of Absolute Politics, the necessity for pretext falls away. Plebescites and elections become old-fashioned, and finally cease altogether."

Yockey defined democracy as "the lowering of everything human to the level of the least valuable human beings." He said the ideological part of the Declaration of Independence "is simply fantastic." He said the "source of government is the *inequality* of men." He maintained that it was "more rationalistic nonsense" to believe that government, as the Declaration of Independence says, should serve as the "safety" and the "happiness" of the people. Instead, he defined government as "the process of maintaining the population in form for the political task, the expression of the Idea of the Nation." He called Abraham Lincoln a charlatan for defining America as "a nation, conceived in liberty, and dedicated to the proposition that all men are created equal." He said "The American ideology and world-outlook have no future."

Yockey worked as an attorney at the War Crimes Tribunal but quit because he felt the Nazis weren't getting a fair hearing.

Yockey charged that the eulogizing of American society as a great "melting pot" of creeds, cultures and colors was a scheme conceived by a Jew to nullify resentment over Jewish migration to American shores. He also claimed that "native movements" like the second Ku Klux Klan, formed in 1915, as an expression of the reaction of the American organism to the presence of foreign matter" had been unjustly maligned as "un-American" by the Culture-Distorters.

And Yockey accused the Culture-Distorters within the Roosevelt Administration of propagandizing the American people into supporting a war against Germany. Yockey said that in the immediate aftermath of Pearl Harbor, the Culture-Distorters "at once spread the 'news' that European planes with European pilots had participated in the attack, and had even led it." Later, he said, the Culture-Distorters "announced that 6,000,000 members of the Jewish Culture-Nation-State-Church-People-Race had been killed in European camps, as well as an indeterminate number of other people."

Yockey went on to say that "the propaganda was on a world-wide scale and was of a mendacity that was perhaps adapted to a uniformatized mass, but was simply disgusting to discriminating Europeans." He continued: "The propaganda was technically quite complete. 'Photographs' were supplied in millions of copies. Thousands of the people who had been killed published accounts of their experiences in these camps. Hundreds of thousands more made fortunes in post-war black markets. 'Gas-chambers' that did not exist were photographed, and a 'gasmobile'

The Private World of Willis Carto

vatism?

Why does the Anti-Defamation League believe Carto's "outreach makes him the leading anti-Semite in the country"? And why did the late Drew Pearson describe Carto as a "Hitler fan" and claim Liberty Lobby was "infiltrated by Nazis who revere the memory of Hitler"?

Why would an attorney who has dealt with him in court say this about Carto? "Everything he does seeks to destabilize society. His panic mailings, survivor-group propaganda approach creates a climate of fear and danger. And it is only within such a climate will he be able to seize the real political power he seeks."

Why does Scott Stanley, the managing editor of the John Birch Society's *American Opinion*, say, "In my opinion, the preservation of anti-Semitism as a movement has occurred because of the activities of Willis Carto"?

Last, but perhaps most pertinent, did Willis Carto choose a neo-fascist to be his inspiration and role-model?

Carto, of course, denies the implications. In a letter to the editor of the *Bakersfield Californian* in 1969, he said, "I am not a Nazi — and never have been." And while he proudly admits to being anti-Zionist, he flatly rejects the charge that he is anti-Semitic.

So what is the truth about Willis Allison Carto? And how can it be determined?

Whatever the criteria, they are certain to be arbitrary. But a set of guidelines published 37 years ago may provide a starting point. In 1944, Americans were reading a best seller titled "Under Cover," a book about the four years John Roy Carlson spent in the Nazi underworld in America.

Drawing upon his experiences, Carlson identified certain characteristics of inherent or incipient fascism — a virulent anti-Semitism to dissolve the social fabric; the pitting of group against group to weaken national unity; rabid Red-baiting to smokescreen fascist propaganda; superpatriotism and a perverted brand of nationalism; encouragement of a survivor mentality to further fragment society; the use of lies and half-truths to win the support of the politically ignorant; adulation of Adolf Hitler; denigration of democracy and agitation for an authoritarian New Order.

Do these criteria apply to Willis Carto and what he represents, a brief recounting of his life and accomplishments is in order.

Carto was born to a family of Huguenot stock on July 19, 1926 in Forth Wayne, Indiana. The family surname originally was spelled Carteaux but was anglicized before Willis Carto was born. He grew up in Mansfield, Ohio (where his parents and a younger brother still live), and served with the Army in the Philippines in World War II, earning the Purple Heart.

Jeremy Horne discovered Carto's true colors when he found a box of racist letters marked "civil rights, personal."

After the war, he attended Denison University in Granville, Ohio, and later enrolled as a law student at the University of Cincinnati. After one semester he dropped out to take a job with Proctor & Gamble.

In 1952, Carto moved to San Francisco and went to work as a debt collector for Household Finance Corporation. After drifting from one right-wing group to another, he decided to organize "a lobby for patriotism" he would call Liberty Lobby. In an attempt to raise $75,000 in seed money, he wrote to 700 conservatives whose names and addresses he borrowed from right-wing mailing lists.

Carto fell $60,000 short of his goal, but used what he was able to raise to set up a "research department" in the offices of the American Council of Christian Laymen on July 4, 1958. Carto's father says his son "borrowed on his GI insurance in order to pay the early bills and went into debt."

Carto then signed up Colonel Eugene Pomeroy, who operated a Washington-based organization called Defenders of the American Constitution, to serve as Liberty Lobby's "Washington Secretary" and organized a 16-member advisory board.

In 1959, Carto staged another fund raising campaign, this time collecting $44,000. About that time, he moved to Belmont, Massachusetts, to join the John Birch Society, but he did not get along with the Society's founder, Robert Welch, and in less than a year he returned to California.

There he published the first edition of Liberty Letter in January of 1961 to give his cause an official voice. He also persuaded retired Air Force Colonel Curtis Dall to front for Liberty Lobby. Dall's official title became chairman of Liberty Lobby's Board of Policy.

Meanwhile, Carto continued to raise money by direct mail solicitation (one of his early benefactors was the late Joseph Pew of Sun Oil Company) and, in 1963, organized two front groups — Americans for National Security and the Government Educational Foundation, Inc. About this time, Carto moved his operations into a rented 30-room Edwardian building on the corner of Independence Avenue and Third Street in Washington, D.C.

The building now is owned by the Government Educational Foundation, which charges Liberty Lobby $6,000 a month rent. The chairman and owner of the foundation is Willis Carto, who bought the building with money contributed by many of Liberty Lobby's members in response to an urgent appeal by Colonel Dall.

Liberty Lobby's money worries began to ease in 1964, when Carto published a harshly judgmental pre-election "political biography" of President Lyndon Johnson. That tabloid "biography" sold an astonishing 10½ million copies. It not only made money for Carto, it drew enough attention to Liberty Lobby to trigger a ten-fold in-

"In my opinion, the preservation of anti-Semitism as a movement has occurred because of the activities of Willis Carto."

Yockey: Profile of an American Hitler

was invented to titillate the mechanically minded."

All of this, Yockey contended, "was designed to create a total war in the spiritual sense, transcending the limits of politics, against Western Civilization. The American masses, both military

While he was a fugitive, Yockey spent much of his time writing letters and articles to support his dogma.

and civilian, were given this mental poison in order to inflame them to a point where they would carry out without flinching, the post-war annihilation program. In particular it was designed to support a war after the Second World War, a war of looting, hanging and starvation, against defenseless Europe."

Given these abhorrent "leaps in imagination," it is not hard to understand why Yockey could not find a publisher. He finally raised enough money to get a thousand copies of Volume I printed by C.A. Brooks & Co., Ltd., and later, 200 copies of Volume II printed by Jones & Dale. Both printing houses were located in London.

What is hard to understand is how anyone ostensibly committed to American values and traditions could embrace Yockey's personal summa and spend the next two decades disseminating its message. Yet that is precisely what Willis Carto has done. Two years after Yockey's suicide, Carto's Noontide Press reissued *Imperium* with a 35-page introduction by Carto, himself. The opening paragraph of that introduction reveals an almost mystical adulation:

"Dimly, I could make out the form of this man—this strange and lonely man—through the thick wire netting," Carto wrote. "Inwardly, I cursed these heavy screens that prevented our confrontation. For even though our mutual host was the San Francisco County Jail, and even though the man upon whom I was calling was locked in equality with petty thieves and criminals, I knew that I was in the presence of a great force, and I could feel History standing beside me."

Whether this jailhouse meeting, which occurred just a few days before Yockey committed suicide, was the first time the two had met is not known. What is known, through his own words, is that Carto shares Yockey's worship of authority and belief in Aryan supremacy and looks upon *Imperium* "as the only foundation which can be used to overthrow the inner enemies, re-conquer the Soul of the West and pave the way to the future."

In his introduction to *Imperium*, Carto justified Yockey's version of "authority" by saying, "It should be remembered that the individual enjoyed far more liberty in Europe under the monarchs than in America today." And of Aryanism, he posed this rhetorical question: "How many Americans or Britons are acquainted with the stupendously elemental fact that they are—in the historical sense—Germans; that

Yockey was diagnosed as "dementia praecox, paranoid type" and medically discharged from the Army in 1943.

they are, like it or not, a part of that great Teutonic-Celtic family which — millenniums before the dawn of Rome or even Greece—was one tribe, with one language?"

Of those who criticized *Imperium*, Carto wrote: "I can tell you that the injustice of it all is enough to drive one mad. How can a man stomach the cynical or ignorant drivel of the liberals as they whine for 'freedom of speech' and 'right to dissent' and shake their bony fists at 'conformity' and all the rest of their legerdemain when one knows that these moral cripples and ethical perverts demand their peculiar freedoms only for those who are working to destroy the West?"

And of Yockey, himself, he wrote: "It was like a certain wise, old reporter whispered to one of Yockey's sisters as she slumped tearfully and quietly in her solitude. 'Your brother is a martyr—the first of a long line of them—if we are to take back our country from those who have stolen it from us.'"

Today, 20 years after the death of this alleged "martyr," we know little more about him and how his philosophy developed than we knew in 1960.

The aura of mystery surrounding the man began with his birth. Some say he was born September 18, 1917, in Chicago. Others say he entered this world in Michigan, where he grew up to be an honor student in high school and a gifted pianist who was kept from a concert career by a childhood hand injury. The cover blurb on Noontide Press's edition of *Imperium* claims he "astounded his parents with his quick intelligence," a claim borne out later when he was graduated cum laude from Notre Dame Law School after attending five colleges.

Some sources say he first manifested anti-American sentiment when he was attending Michigan State University. On one occasion, it is reported, he outraged university officials by playing the "Internationale," a communist hymn at a faculty party.

Yockey enlisted in the Army on May 20, 1942, and was AWOL from September to November. Psychiatric examinations undertaken after Yockey was returned to authorities at Camp Gordon, Georgia, revealed marked delusions of persecution. He "involved prominent people in his delusional system," according to the Army report, and felt superior to his commanding officers. The report also noted that Yockey admitted auditory hallucinations and stated that he heard the voice of his dead father talking to him from time to time.

Yockey was diagnosed as suffering from "dementia praecox, paranoid type," and was given a medical discharge from the Army in July of 1943. In short, he was certifiably mad.

For a time, he worked as a rent attorney in Detroit, handling eviction

The Private World of Willis Carto

crease in subscriptions to Liberty Letter. By 1970, Liberty Lobby's annual income had risen to nearly a million dollars.

Another significant benchmark was reached in September of 1975, when Liberty Letter was replaced by *The Spotlight*, which today boasts 335,000 readers, 36 pages per issue, and a staff of 25.

Though he is the founder, sole owner and motivating force behind Liberty Lobby, Willis Carto's name does not appear on the masthead of *The Spotlight*. Shunning attention, Carto no longer speaks in public, refuses to be interviewed, and keeps an unlisted telephone number.

He directs his operations from a plush penthouse in Torrance, California, a suburb of Los Angeles, and conducts his business by way of conference calls from a public telephone, according to *Spotlight* Managing Editor Jim Tucker.

Carto's East Coast headquarters is home not only for Liberty Lobby and *The Spotlight* but also for SOS, a mail order firm which sells laetrile; another mail order operation which sells cassette players and portable camp stoves; and United Congressional Appeal, which raises money for conservative candidates, including a Ku Klux Klan member who ran for Congress.

In 1968, another Carto "front" organization called United Republicans for America used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York. That same year, a conglomerate political front — Action Associates/Youth for Wallace/National Youth Alliance — raised $50,000 for George Wallace's Presidential campaign.

Two other Carto fronts, Americans for National Security (his contact with the military) and Friends of Rhodesian Independence, are listed in the current Washington directory, but phone calls to both elicited only puzzled remarks from the Liberty Lobby switchboard operator.

Carto's West Coast operations spin off from the Legion for the Survival of Freedom, Inc. This company owns Noontide Press, Carto's personal publishing house; the once-respected American Mercury magazine, which Carto acquired in 1966 and sold in 1979; and the Institute for Historical Review, which publishes books, an "academic quarterly" called the *Journal for Historical Review*, and stages conventions.

Nor has Liberty Lobby overlooked the opportunities the electronic media offer to spread its message. "This Is Liberty Lobby," a daily radio broadcast, now has 465 outlets. And a new half-hour television program, offering Liberty Lobby's version of the news already is being seen in 36 cities. Both are conducted by long-time Carto associate Bob Bartell, who has now replaced the aging Colonel Dall as chairman of Liberty Lobby's Board of Policy.

"Whenever you find anti-Semitic literature coming out from some little fly-by-night front, it seems to be associated with the Carto network."

Early this year, Liberty Lobby threw a big party in Washington to celebrate *Spotlight*'s gains in circulation, the success of its radio program, the launching of the new television show and, one might assume, an annual income from contributions that approaches $4 million, according to Bob Bartell.

What emerges from this surface accounting of the life and achievements of Willis Carto is the image of a political conservative and successful businessman. To gain insight into why the man and his operations fill some Americans with fear and loathing, one must look beneath the surface.

The opportunities for gaining this insight are relatively few, to be sure. But they are there — provided for the most part by enterprising journalists, the Anti-Defamation League, disenchanted Carto employees and by the man's own rare, but significant, indiscretions.

In the mid-Fifties, when Carto was drifting from one right-wing organization to another, he corresponded with segregationists and secretly organized and promoted the Joint Council for Repatriation. What he meant by "repatriation" was the forced deportation of all blacks to Africa.

Though Bob Bartell today denies that there is any connection between Liberty Lobby and the Joint Council for Repatriation, he admits that "when the purpose of an organization is accomplished, then it is dissolved or incorporated into some other aspect." An ex-Liberty Lobbyist says, "Carto has a lot of organizations he sets up solely for the purpose of raising money. They vanish as soon as they've served their purpose." And Birch Society editor Scott Stanley notes that "Whenever you find anti-Semitic literature coming out from some little fly-by-night front, it seems to be associated with the Carto network."

Precisely what motivated Carto's interest in deporting blacks to Africa is a question, but in a letter to an official of the Mississippi White Citizens' Council, Carto once wrote: "It is not hard to conclude that the Negro problem is the very keystone to the whole dirty scheme to destroy America." The letter went on to condemn "equalitarian theories and legislation or court decisions brought on by this tearful sympathy for the Negroes."

By the late 1960's, Carto and Liberty Lobby were attracting the critical attention of columnist Drew Pearson. On April 17, 1969, Pearson's column quoted a memo signed by Carto. Copies of the memo had been given to the columnist and to the FBI by

Carto often observes interviews of prospective employees through a mirror.

Jeremy Horne, a veteran member of the Liberty Lobby staff. Horne had stumbled upon the memo in a file marked "civil rights — personal." Disturbed by its contents, Horne first thought of showing it to other staffers,

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cases and review petitions. He "always did his work well," according to Helmuth Krave, a colleague. "He kept to himself," Krave added. "He was an unusual fellow, never said much, but we talked about history. I think he had a good head on him. He never revealed to me that he was a racist. Once I asked him if he thought Hitler was dead, and he said yes, there was no question about it. I thought that he must have been German, he knew how the German mind worked."

In 1946, when many Army lawyers were being discharged, Yockey obtained a job as a review attorney with the War Crimes Tribunal and, with his wife and two small daughters, went to Germany for the prosecution of surviving Nazi leaders. His supervisor, Samuel Sonenfield, later said this of Yockey: "He never could seem to be found . . . (His wife) was a mousy little creature, pale and grey, and seemed completely cowed by him. My brief impression of him had been that those whom he could dominate he would."

"In that instant," wrote Carto later of the look Yockey gave him, "we understood that I would not desert him."

The Yockeys separated upon their return to the United States, Mrs. Yockey taking the girls to her home in San Antonio. Yockey then began a sojourn that took him back to Germany and then to Ireland, where he wrote *Imperium*.

Publication of the book was to bring Yockey under scrutiny by federal authorities. By 1951, the military already had an open file on him, and the FBI had begun to investigate his activities and associations. In 1952, his passport was revoked in absentia by the State Department, and two years later he was identified as a U.S. agent for neo-Nazi Rudolph Aschenauer of Frankfurt, Germany.

Yockey became a fugitive when he continued to travel abroad under at least 20 aliases, including "Edward Max Price" and variations of his own name or his pen name. Though there is no record of him ever holding a full-time job after *Imperium* was published—except for a brief stint with the Red Cross to get back to Germany—Yockey somehow found the means to criss-cross the United States and Canada and to make trips to Europe and to Egypt all the while dispensing his neo-fascist message. At times, he even trimmed his moustache to resemble Hitler's.

He also enlisted the companionship and support of a series of women, described as being "generally bright and attractive." Several, including one prostitute, posed as Yockey's wife. And, as "Richard Allen," he married one woman in Santa Cruz, California, in 1955, but left her a few days after the wedding.

How did Yockey support his lifestyle and political proselytizing? He was a cocktail lounge pianist in Monterey, California, for a time in 1954 and spent a season on the old Atlantic City Boardwalk selling artwork painted on the heads of common pins. But most of his money, it is surmised, came from scams such as travelers' check swindles and from right-wing soul mates like Frederick Weiss, Gerald L.K. Smith, Egilio Boschi and Rudolph Aschenauer. He also got some support from his family. Yockey's brother-in-law, Lt. Commander William D. Coyne, sent "Edward Max Price" a remittance for $500 in 1955. Coyne told FBI agents he had never heard of "Price" but recanted when he was shown a copy of the remittance.

In the summer of 1959, Yockey appeared in Reno, where he met Hebrew School teacher Alexander Scharf at a gaming table. Scharf had just lost all his money, and Yockey bought him a cup of coffee and loaned him $20 for the bus fare back to this home in Oakland.

The most widely known likeness of Yockey shows him bound in handcuffs.

A bluish tattoo on his wrist identified Scharf as a survivor of the Nazi concentration camp at Auschwitz. He had lost most of his family in the Holocaust, and his most graphic memory of Auschwitz was the fatal queue. If a prisoner went to the left, he was killed. If he was directed to the right, he had a chance for life in a labor camp. By the grace of a German soldier, Scharf was directed to the right and survived.

After the war, Scharf spent several years in South America, and then came to the United States to attend Columbia University and the Jewish Theological Seminary. When Yockey first met him, Scharf was the director of education at Temple Beth Abraham in Oakland. He was also a compulsive gambler. Yockey introduced himself by the name "Taylor" and told Scharf he was a writer. He spoke warmly of Jews and said he would like to talk with Scharf because Scharf was a student of the Bible.

Though the two were to get together for drinks and dinner several times that summer, Scharf learned little about his new-found "friend." He never saw any of Yockey's writing. He didn't ask why he was asked to sign Yockey's application for an Irish passport. And he missed the possible political significance of modern-day pantheism when Yockey once said to him, "You wouldn't understand this. You believe in God. I do not believe in God, but in gods, more than one." And, though Yockey always seemed to have money, Scharf never asked him how he made his living, even though Yockey offered several times to bankroll Scharf in a business venture.

When Yockey resumed his travels, he sent Scharf postcards from New York, New Orleans and Washington. One day in June, 1960, Scharf received a telegram announcing Yockey's imminent arrival in Oakland and asking for a place to stay. When Yockey arrived, he told Scharf his baggage had gone astray and that, once located, the airline would deliver it to Scharf's apartment in the name of "Richard Hatch." Scharf did not ask Yockey why he was now "Richard Hatch" instead of "Taylor."

Yockey's large grey Samsonite suitcase had been sent to Fort Worth, not

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but was not certain of how they would react.

As it appeared in Pearson's column, the memo read, in part: "Hitler's defeat was the defeat of Europe. And of America. How could we have been so blind? The blame, it seems, must be laid at the door of the international Jews. It was their propaganda, lies, and demands which blinded the West . . . . If Satan himself had tried to create a permanent disintegration and force for the destruction of nations, he could have done no better than to invent the Jews."

Carto, whose speeches were once a staple of ultra-right gatherings, no longer speaks in public.

Furious over the column, Carto sought a court injunction to stop Pearson from writing about Liberty Lobby. The presiding judge not only denied the request, but remarked that it was perhaps a good thing to have Carto's operations scrutinized by the columnist.

Carto was to file two suits against Pearson, both of which were decided in the columnist's favor. A third suit, for $2 million, was about to be filed when Pearson died. Bob Bartell said Pearson "did us a disservice by dying."

Before the columnist died, Carto used one of Liberty Lobby's publications to have himself described as "a combat infantryman in the Philippines [who] earned a Purple Heart defending the rights of conscientious objectors like Pearson."

Though Carto associates insist to this day that the memo Pearson reprinted was a fraud, Carto's own *Washington Observer* publication argued that "the boxes were broken open by the thief who was paid by Pearson." If the memo was, indeed, a fraud, why was it in Carto's personal file box?

Even more to the point, why would a man who says he is not anti-Semitic establish something called the Institute for Historical Review? The Institute, an integral part of Carto's West Coast operation, was set up to disprove that any Jews died in World War II gas chambers. The Institute argues that perhaps 350,000 Jews died of disease and war injuries, but that none died in extermination programs.

The treasurer for the Institute is Carto's wife, Elisabeth Waltrud Carto. A handsome woman of conservative dress, she married Carto in 1958 but has maintained her German national status (last year she applied for U.S. citizenship). Mrs. Carto still travels on a West German passport, and reportedly visits her homeland once a year.

Fiercely loyal to her husband, she is deeply involved in his organizational activities and is called "Eva Braun" behind her back by some Liberty Lobby employees. While Mrs. Carto knows everything, she also knows nothing: a May, 1981, deposition, taken as part of a lawsuit, contains five hours of stonewalling. She even refused to say exactly where she was born or divulge her maiden name ("Waltrud" is her middle, not maiden name).

Until late this spring, director of the Institute was a man who used the name "Lewis Brandon." In May, the Anti-Defamation League made public a letter from the Board of Deputies of British Jews identifying "Brandon" as William David McCalden and describing him as a "neofascist activist" who defected from Britain's National Front in 1975 to form the National Party, a group espousing "British racial nationalism." About that time "Brandon" announced he was going on vacation, and an assistant began identifying himself as the new director.

The Institute first attracted media attention when it offered a $50,000 "reward" to anyone who could prove that the death of six million Jews in the Holocaust ever took place. The Institute also offered $25,000 for proof of the authenticity of Anne Frank's diary, or proof that any Jews were made into soap.

The Institute demanded that "proof" be presented to a tribunal of "experts" it would appoint. "The IHR asked for photographs, diaries or first-hand witnesses," said the ADL's Irwin Suall.

"I am not a Nazi," proclaims Willis Carto, head of the ultra-right Liberty Lobby, "and never have been." But he did set up the Institute for Historical Review whose main task was to disprove the death of six million Jews in the Holocaust.

"You can just see the victims writing in diaries or taking pictures as they are being ushered into the gas chamber."

Apparently emboldened by the reluctance of Holocaust witnesses to dignify the Institute's offer, "Brandon" last year sent an application form to Auschwitz survivor Mel Mermelstein, who had written a book about his experiences. In his letter accompanying the form, "Brandon" said "If we don't hear from you soon we will be obliged to draw our own conclusions and publicize the fact to the mass media."

After consulting with attorney William Cox, Mermelstein filed an application with the Institute within a few weeks. But "Brandon" stalled, saying the Institute would first examine an application from famed Nazi hunter Simon Wiesenthal. Subsequently Wiesenthal withdrew his claim, and Mermelstein waited to testify. Instead, he was told that the Institute would not take up his claim until "later."

Angered at being put off for so long a time after having been threatened to respond immediately or suffer the consequences, Mermelstein and Cox filed a million-dollar suit against the organization, saying they would prove in court that the Holocaust was fact, not hoax.

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YOCKEY

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San Francisco, and when the bag went unclaimed in Fort Worth, airline authorities opened it to see if the contents would help them identify the owner. They found three passports, all with different names, German press credentials, several drivers licenses, birth certificates and checkbooks, and $850 in travelers checks. The airlines notified the FBI and advised that a tracer for the bag had originated in San Francisco.

On June 6, two days after Yockey had arrived at Scharf's Oakland home, FBI Agents Robert Leonard and Alfred Miller arrived with Yockey's suitcase. Yockey was gone on an errand, but phoned while the agents were questioning Scharf to ask if the suitcase had arrived. Scharf said it had, but did not tell Yockey about the agents.

At 11 a.m. Yockey returned to the apartment. He confirmed that the suitcase was his, produced a key, and told the agents they were free to examine the contents. He displayed surprise over the passports and other phony documents.

The agents then inventoried all of Yockey's possessions, and asked him why he had more than $2,000 in cash. Yockey said he intended to loan some of it to Scharf. Shortly after, the agents overheard Scharf ask for a loan of $200. They also heard Yockey say, "That would no longer serve any purpose. I no longer have any interest in your problems."

Keith Teeter, a third FBI agent who had arrived at the apartment, pressed Yockey as to why he had so many passports. Yockey said he had a logical reason, but was afraid to express it "because I'm sure my explanation will be misunderstood."

About 2:45, while the agents were talking with Scharf, Yockey suddenly bolted for the door to the back porch. Agent Leonard caught him by the left wrist and told him he was under arrest. Yockey responded by slamming the porch door on Leonard's hand, inflicting a deep gash. Breaking free, he sprinted down the back stairs. Agent Miller raced after Yockey and caught him in the street. A subdued but unruffled Yockey apologized to Leonard, saying "I'm sorry, I didn't mean to do that." Later he told the agents he had tried to get away "because I wanted to make a phone call."

Shortly after Yockey's arrest, an unidentified government official told San Francisco newspapers, "This is not a small fish. This is a man we are very, very interested in." But an FBI communique dated the day after Yockey's arrest said, "The FBI does not have a strong case at the time."

The "mystery man" mystique surrounding Yockey intrigued the press. Many newspapers published the picture of him in handcuffs, looking smug and self-assured, that was later featured on the back cover of *Imperium*.

Yockey was brought before U.S. Commissioner Joseph Karesh on charges of passport fraud, but the $50,000 bail was ten times the amount usually set in such cases. He was also charged with assaulting a federal officer and failing to register for the draft. For all the fraudulent documents he carried, Yockey did not have a draft card. "I didn't think it was necessary," he told the FBI. "I registered in 1940."

Shortly after his arrest, Yockey met with his two sisters, Alice Spurlock and Vinette Coyne, both of whom carried apparently well-thumbed copies of the Constitution. Another visitor was Willis Carto, whose Liberty Lobby was then in its infancy.

Carto also attended Yockey's hear-

CARTO

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Though the Institute for Historical Review has withdrawn its offer of money for proof the Holocaust occurred, Mermelstein and Cox are pressing their case. Cox has acquired affidavits from Mermelstein and other concentration camp survivors and is gathering information about Liberty Lobby and other Carto organizations. He has taken depositions which made it clear that all significant Institute decisions were made by Willis Carto. But Carto, himself, ignored a notice to appear for deposition, leading one observer to say, "It's almost as if he's playing into their hands."

"Lewis Brandon's" injudicious provocation of the Mermelstein suit was not the first time a staffer's poor judgment has hurt the Carto organization. Nor was Jeremy Horne's decision to turn the incriminating Carto memo over to Drew Pearson the only time a Liberty Lobby employee has answered the call of conscience.

Carto once instructed Sarah Shields Jobe to assemble a "KKK" (Kosher Conservative Congressmen) file that listed secret organizations to which certain Congressmen belonged. Disturbed by what she saw as the potential for blackmail, she defected, turning over several Carto files to columnist Jack Anderson's reporters.

Outraged over whistle blowing by people who had worked for him, Carto turned to lie detector and voice stress tests to ensure loyalty and operational security. Each new employee now must sign that they are willing to take such tests at any time. Refusal constitutes grounds for dismissal.

"Because of the nature of our institution," explained Bob Bartell, "it is important for us to force out any and all infiltrators. . . . We've caught people stealing from us and selling information about us to other people."

Liberty Lobby often hires outside consultants to conduct interviews, with Carto watching through a one-way mirror. "Willis could never understand that there was no such thing as a lie detector, although that fact was explained to him several times," one observer said. "He had a concept of a machine that goes 'tilt' whenever anyone tells a lie, like in the cartoons."

But polygraph and voice stress tests are no protection against outside infiltration of Liberty Lobby meetings, however secret, nor from public exposure of what goes on at those meetings.

One such meeting took place at the elegant Barclay Hotel in New York City on November 22, 1970. According to the Anti-Defamation League, which apparently planted an informant, Liberty Lobby's Bob Bartell asked 50 influential right wingers for help in raising $400,000 for a project Bartell called "Operation Survival." The ADL called it a plan to establish a right-wing military dictatorship. Bartell reportedly said "Operation Survival" was necessary to save the country from being taken over by the Communists.

Carto's detractors and supporters alike agree he has the brains and the guile to create a great deal of mischief. He can discuss philosophy, politics and most other subjects in an erudite manner. He can be good company, usually witty and entertaining.

Outside a social setting, however, Carto is less relaxed. Once, during an interview of a prospective Liberty Lobbyist, the interviewee made a remark

Yockey: Profile of an American Hitler

ing. "As his gaze swept across, and then to me, he stopped and for the space of a fractional second, spoke to me with his eyes." Carto wrote in his introduction to *Imperium*. "In that instant, we understood that I would not desert him."

Commissioner Karesh had a different reaction. "He had a stare," he said of Yockey. "It was like he was looking right through you but never directly at you."

Yockey's lawyers tried to get his bail reduced, but the U.S. Attorney asked that it be kept at $50,000 because of "an extreme risk of flight—a grave risk of injury to himself and to others." His suspicions were well-founded. Yockey approached two other prisoners and offered to post bail for one man, who was then to get a car and guns from Yockey's outside connections. But the bail posting fell through, and one of the prisoners told the FBI of the plot.

After attending five colleges, Yockey was graduated from Notre Dame Law School, cum laude.

Yockey's attorney, Carl Hoppe, then surprised Yockey and the court by proposing that his client take a psychiatric examination. Yockey fired Hoppe on the spot, crying "That's a dirty trick!" He later argued that bringing his Army medical records into the case violated his rights. But Federal Judge William Seigert ordered a psychiatric evaluation on June 15, just two days before Yockey killed himself.

One lawyer involved in the case said, "I think he was resisting psychiatric examination because he was afraid the psychiatrist would find out who his contacts were."

William P. Clancey, who served as assistant prosecutor in the Yockey case and is now an Episcopal minister in Berkeley, Calif., recalls that the judge appointed three psychiatrists, all Jewish, to conduct the examination. "His (Yockey's) lawyer just put him on the stand, and he argued his own case," Clancey said. "I just let him go on, and he completely wiped himself out. He was definitely not of sound mind, although he seemed to be oriented as to time and space. Had he not died, I think an insanity plea would have been entered."

While in jail, Yockey complained about laundry facilities, insufficient opportunity to communicate with his family and his lawyers, and the presence of reporters. When one reporter approached Yockey at his hearing and asked him if he had ever been to Russia, Yockey snapped, "Get out of here, you filthy swine!" At the same hearing, Bernie Rauch, a photographer, addressed Yockey in German, saying, "Don't worry, you are among friends." Yockey tried to reward Rauch's solicitude with exclusive photo rights.

Sometime during the night of June 16/17, Yockey imposed his own death sentence. When his cellmate, Adam Nieman, tried to waken him for breakfast, he found Yockey dead, his mouth seared by potassium cyanide.

The mystery man died as mysteriously as he lived. In death, he wore only his underwear and a pair of boots that resembled those worn by Hitler's elite SS guard. And he left behind a suicide note as cryptic as the dedication he wrote for *Imperium:*

"I shall write no messages which I know will never be delivered," the note said. *"Only this, which will be, you will never discover who helped me for he is to be found in your own multitudinous ranks, at least outwardly."*

What did he mean by "helped"? "Helped" his cause? or "helped" him kill himself? Yockey had threatened suicide several times, and a sharpened comb, with the teeth removed, had been confiscated from his cell. But it was never determined how he got the potassium cyanide. Did one of his visitors slip it to him? Or, as reporter Rauderbaugh speculated, had Yockey hidden the poison on or in his body before his arrest? High level Nazis, it was recalled, carried a suicide pill they could take if captured.

At a press conference the day after her brother's death, Vinette Coyne was asked why Yockey carried three passports. She glibly responded, "Maybe he thought three passports were better than one." When she was asked why her brother took his own life, she con-

Yockey's cellmate was the first to find him dead, dressed only in underwear and SS-style boots.

jectured that Yockey probably thought he would not get a fair trial.

Though he had often described himself as a pantheist, Yockey was born a Catholic. He was buried in St. Mary's Catholic cemetery at Gilroy, Calif., near where his sister, Alice Spurlock, once lived. No one pays maintenance services for his grave, nor is there a gravestone.

With Yockey dead, the FBI and the media turned their attention to Scharf, who had fled the scene shortly after the arrest, leaving behind his abandoned car and all his possessions.

San Francisco *Chronicle* reporters Charles Rauderbaugh and Denne Petitclerc remembered Scharf's Soviet-American connection and his gambling penchant and correctly surmised that he had gone to Cuba. In August, Scharf called the newspaper and said he would like to return and answer questions.

The *Chronicle* booked Scharf back to San Francisco under an assumed name. For the next three days, Petitclerc and Rauderbaugh interviewed Scharf and in Petitclerc's words, "Tore that little guy apart."

"I think that Yockey was looking for a mule," Rauderbaugh said later. "Scharf was not very political, and he was very naive. He just didn't know what was going on. He was afraid of what was going to happen." Petitclerc, now a novelist, says, "Yockey was playing a puzzling game. Their relationship was never thoroughly explained. Yockey was kind to Scharf. It didn't turn out to be what we expected. It really smelled like a conspiracy. We thought Scharf could have been an agent for the Israelis or the FBI. But it boiled down to a little man, scared and crying, saying, 'He was my friend.' Yockey was just being nice to him."

In an article that appeared on August

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deprecating the military. This angered Carto who interrupted the interview and delivered a ten-minute pro-military harangue.

"It's not easy to communicate with him," said one Carto associate. "He doesn't always listen. But he's actually mellowed out over the past year. He used to be more uptight. He's not as prickly as he used to be. He takes a hardnosed line, but if you stick to your guns he'll eventually listen."

Said Irwin Suall of the Anti-Defamation League, who has encountered Carto in court on several occasions: "He's a very stiff person. I'd call him an 'anal personality.' My impression is that he's one of these finnicky, meticulous guys."

'He's very frugal," another associate said. "He used to get his hair cut at the congressional barber shop, where he'd pay seventy-five cents. He spends no money and puts very little stock in personal appearance."

Others feel Carto is consciously attempting to emulate *Der Fuhrer*. "All he needs is a little square moustache and side-parted hair," said one acquaintance. Certainly, Carto is decidedly military in his demeanor, he often issues brusque step-by-step instructions about the most menial procedures.

Carto, also, tends to overreact. In 1962 he was arrested in a suburban Washington supermarket for "cursing." He was fined only $10 but threatened to appeal the case all the way to the Maryland Supreme Court. In 1969, his wallet was taken from him by three youths; one of the alleged thieves (later acquitted) was apprehended a few blocks away by police. Carto ran up to the suspect and kicked him forcibly in the rear.

In this scrutiny of Willis Carto and what he represents, five of the characteristics John Roy Carlson said identify inherent or incipient fascism have manifested themselves in greater or lesser degree. They are: a virulent anti-Semitism to dissolve the social fabric; the pitting of group against group and race against race to weaken national unity; incessant Red-baiting to smokescreen fascist propoganda; superpatriotism and a perverted brand of nationalism; and the creation of a "survivor mentality" to further fragment society.

Three other characteristics are also evident in the Carto record: the use of lies and half-truths to win the support of the politically ignorant; adulation of Adolf Hitler; denigration of democracy and agitation for an authoritarian New Order.

With regard to the first, a brief examination of Carto's weekly tabloid, *The Spotlight*, is in order. Though it calls itself "The Paper You Can Trust," *The Spotlight* trafficks in sensationalism, character assassination, innuendoes and outright misrepresentations. Typical of the headlines splashed across its pages are: "Soviet Spy in White House," "Rockefeller Named Dope Overlord" and "The Diary of Anne Frank Is a Fraud."

Carto, through the Institute for Historical Review, has called the generally accepted reports of German concentration camps false.

The Spotlight's stock in trade are stories that purport to expose the "Jew-Zionist" international bankers' conspiracy against hard-working, blue-collar Americans. These "international bankers" are often identified as "the real communists" whose plans include "mongrelization" of America and a one-world government. International organizations of business and political leaders like the Trilateral Commission and the Bilderberg Group are favorite targets, along with Carto's political foes.

But can you believe what you read in the "Paper You Can Trust"? Not long ago, a free-lance reporter for *The Spotlight*, J. Michael Dunsmore, told *The Investigator* that a lead story in the May 21, 1979 issue of Carto's tabloid was a total hoax. The headline read: "Global Elite Planning to Topple World Governments." The story, written by Dunsmore under the pseudonym "Tom Waits," reported that a *Spotlight* reporter had traveled to Baden, Austria, for an April 1979 Bilderberg Conference. But Dunsmore now says neither he nor any other reporter for

At a party given in his honor in 1968, a number of the guests wore Nazi insignia, and Carto reportedly delivered a speech emulating Hitler's style.

the paper went to Baden and that the reported conversation with a "Bilderberg official" never took place.

Vincent A. Drosdik III, a one-time assistant editor of *The Spotlight* who says he quit after nine months because he "couldn't take the inside-the-office racism," tells of another instance where a feature was contrived to serve Carto's political prejudices. This time the target was Yugoslavia's Marshal Tito.

"Tito was scheduled to come to town," Drosdik recalls. "Carto had this wild hair up his ass about getting Croatian exiles to protest the visit. We couldn't find any. So we went to our typesetter and renamed her 'Ginny "Dragonovich" We quickly made up a poster for her and took her to the Capitol building. Well, the 'protest' lasted all of two minutes — just enough time to photograph her."

Some three months before the 1976 Presidential election, *The Spotlight* published a story headlined "Carter's Cocaine Connection" that attempted to link Jimmy Carter's fleeting campaign association with rock singer Gregg Allman and Capricorn Records President Phil Walden to a drug scandal.

Walden considered, then dropped, the notion of filing a libel suit, but in a preliminary report, his lawyers noted: "A detailed reading of *The Spotlight* articles referring to Capricorn Records, Phil Walden, Gregg Allman or Scooter Herring is necessary to get any sense of the subtle way in which the publication attempts to malign people, particularly by way of setting up the

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APPENDIX C
Answer and Counterclaim

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No.
	)	81-2240
JACK ANDERSON, *et al.*,	)	
	)	Honorable
Defendants.	)	Barrington Parker
	)	District Judge

ANSWER AND COUNTERCLAIM

Defendants, Jack Anderson, The Investigator Publishing Company and Bill Adkins, for their answer to the complaint:

1. Admit paragraph 1.

2. State that they are without knowledge or information sufficient to form a belief about paragraph 2.

3. Admit paragraph 3.

4. Admit paragraph 4.

5. Admit paragraph 5.

6. Admit paragraph 6.

7. & 8. Make no response to paragraphs 7 and 8 as the named defendants in these paragraphs have been dismissed by plaintiffs.

9. Deny paragraph 9.

10. Admit paragraph 10.

11. Reassert their responses to paragraphs 1 through 10 as though set down in full herein.

12. Deny paragraph 12, except admit that Liberty Lobby is a lobbying organization that advocates and promotes political and social issues in order to have impact upon their resolution.

13. Admit the articles attached to the complaint were published in the October 1981 issue of *The Investigator* and state that the articles speak for themselves.

14. Deny paragraph 14 and each of its subparts and state that the articles speak for themselves.

15. Deny paragraph 15.

16. Deny paragraph 16.

17. Deny paragraph 17.

18. Deny paragraph 18 and state that the articles speak for themselves.

19. Deny paragraph 19.

20. Deny paragraph 20 except state plaintiffs or one of them did send a letter to defendant Anderson concerning the articles and state that the letter speaks for itself.

21. Deny paragraph 21.

SECOND CLAIM FOR RELIEF

22. Reassert their responses to paragraphs 1 through 21 as though set down in full herein.

23. State that the articles speak for themselves.

24. State that they are without knowledge or information sufficient to form a belief about paragraph 24.

25. Deny paragraph 25.

26. State that they are without knowledge for information sufficient to form a belief about paragraph 26.

27. Deny paragraph 27.

28. Deny paragraph 28.

29. Deny paragraph 29.

FIRST DEFENSE

30. The articles of which plaintiffs complain are true. (Defendants do not admit that truth is an affirmative defense. Plaintiffs must prove that the allegedly defamatory statements are false facts.)

SECOND DEFENSE

31. Plaintiffs fail to state a claim for libel.

THIRD DEFENSE

32. The articles of which plaintiffs complain are privileged under the First Amendment in that they were a communication about public figures to the general public and it was published without actual malice.

FOURTH DEFENSE

33. The articles of which plaintiffs complain are privileged at common law in that it was a communication to the general public concerning matters of general public interest and concern and it was published without actual malice.

FIFTH DEFENSE

34. The articles of which plaintiffs complain cannot be actionable as to the opinions of defendants.

SIXTH DEFENSE

35. The plaintiffs are estopped and barred by law from relitigating factual issues relating to their activities that have been previously determined by decisions of the courts.

SEVENTH DEFENSE

36. The articles of which plaintiffs complain were published without fault, in good faith and in the belief that they were true.

WHEREFORE defendants pray judgment (i) that the complaint be dismissed; (ii) that defendants be awarded the costs, disbursements and attorney fees of this action; and (iii) that defendants be granted such other relief as this Court may deem just and proper.

FIRST COUNTERCLAIM BY JACK ANDERSON

37. Jack Anderson for his first counterclaim, states, that Plaintiff Liberty Lobby Inc. publishes a magazine, *Spotlight*.

38. In the September 14, 1981 issue of *Spotlight*, a photograph of Jack Anderson was published on the front page with the following caption: "Jack Anderson is a gifted fiction writer."

39. The September 14, 1981 issue of *Spotlight* was published and distributed throughout the United States, including the District of Columbia.

40. The statement that Jack Anderson is a "gifted fiction writer" is false and defamatory causing injury to defendant Anderson in his business and profession.

41. The defamatory publication was published with knowledge of its falsity and/or a reckless disregard for the truth.

WHEREFORE defendant Jack Anderson is entitled to receive from plaintiff Liberty Lobby actual damages of $2,000,000 and punitive damages of $22,000,000.

Respectfully submitted,

WHITE & CASE

Dated: 25 May, 1982

David J. Branson
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 872-0013

WOODS, VILLALON,
HOLLENGREEN & APPEL

Leonard Appel
Suite 1020 Pennsylvania Building
Pennsylvania Avenue & 13th Street
Washington, D.C. 20004
(202) 628-4600

Attorneys for Defendants.

CERTIFICATE OF SERVICE

I certify that on 26 May 1982, a copy of defendants' Answer and Counterclaim was mailed to Fleming Lee, Esq., 300 Independence Avenue, S.E., Washington, D.C. 20003.

May 26, 1982

DAVID J. BRANSON

APPENDIX D
Affidavit of Charles Bermant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC.,
WILLIS A. CARTO,

Plaintiffs,

v.

JACK ANDERSON,
THE INVESTIGATOR PUBLISHING COMPANY,
BILL E. ADKINS,
WILLIAM C. McGAW, and
JAY J. ARMES,

Defendants.

Civil Action No. 81-2240

Judge Parker

District of Columbia ss.:

AFFIDAVIT OF CHARLES BERMANT

1. My place of residence is 5415 Connecticut Avenue, N.W., Washington, D.C. I am a reporter for Jack Anderson Enterprises and was Associate Editor for *Investigative Reporter (Investigator)* magazine. The *Investigator* has ceased publication.

BACKGROUND AND EXPERIENCE

2. I graduated from Boston University, School of Public Communication, in May 1977 with a degree in Journalism.

3. While in college I contributed articles to the college newspaper and I also freelanced articles to The Washington Post, The Albuquerque Journal, Sounds Magazine and other publications.

4. In October, 1977 I began employment as a General Assignment Reporter/Photographer on The Rio Grande Sun in Espanola, New Mexico. I worked there as a reporter for one year.

5. In October, 1978, I was hired as a reporter and special sections editor at the Carlsbad Current-Argus in

Carlsbad, New Mexico. I worked on that paper for one year.

6. From October 1979 to November 1980 I worked as a freelance writer in Phoenix, Arizona and Albuquerque, New Mexico.

7. I joined Jack Anderson's staff as an intern in November 1980 and was promoted to full staff in March 1981. I was assigned editorial duties for the new magazine and for the daily column.

THE CARTO/YOCKEY STORIES

8. In early May, 1981, *The Investigator*'s Managing Editor, Joe Spear, gave me a copy of Yockey's "Imperium" and said that Yockey and Carto would be the subject of articles in the magazine. He said that I would be assigned to work on the story.

9. The first step I took on this story was to file FOIA requests about Yockey with several government agencies. I began gathering published material about Willis Carto, Liberty Lobby and F. P. Yockey. In doing this, I visited the D. C. Public Library, the Library of Congress, the library of The Washington Post, our own office files, and other places in Washington. I also received materials from the San Francisco Chronicle.

10. I received the FOIA information about F. P. Yockey, some 1,200 pages of documents and newspaper clippings. I pored over them and the other documentary material I gathered. I then began to interview people, some over the telephone and some in person. I interviewed, *inter alia*, Helmuth Krave, Joseph Karesh, William P. Clancey, Charles Rauderbaugh and Denne Pettitclerc. I also contacted Wes McCune, Liberty Bell, a West Virginia based magazine, Thomas Francis, personnel at the Anti-Defamation League, Congressman Hansen and the Federal Election Commission.

11. I worked on these stories for most of five weeks. The materials I gathered and studied fill a box and these

materials were produced to Liberty Lobby's counsel in this litigation for review. I also read Willis Carto's introduction to *Imperium* and I read much of *Imperium*'s 615 turgid pages.

12. During the early period of preparing to put out *The Investigator*, we received many inquiries from freelance journalists. One such freelancer was Robert Eringer. Eringer indicated he had several story ideas, one of them a story about Liberty Lobby printed in a recent *Mother Jones*. I informed him that we were interested in exclusive material and I was at work on my own story on Liberty Lobby. He said he would send in that story, along with three others. Robert Eringer's material arrived in early June. Along with his manuscript, he enclosed a book he had written on the Trilateral Commission.

13. I arranged an interview with Bob Bartell of Liberty Lobby for June 11, 1981 at 3 p.m. I arrived early for the scheduled interview accompanied by Susan Hamburg, an acquaintence who is also an amateur photographer. Bartell received us in his office at 300 Independence Avenue, S.E. and we talked for approximately 90 minutes. Before leaving Bartell's office, I requested an interview with Carto. Bartell said that he thought it could be arranged and that I should call him the following week. I did so three times. Only one of those times did I actually get through to Bartell. He said he would "get back to me." The following two times my calls were not returned.

14. On Friday, June 12, I began taking all of my notes and material and shaping them into a first draft. Most of the work completed that day was on the Yockey piece.

15. On June 15 or 16, the office received a call from William Cox, a California attorney, who said he had material on Carto and Liberty Lobby. I called Cox in California. He said he would be in Washington June 21 and we made arrangements to meet in the Hyatt Regency.

16. I met Cox that day at 1 p.m. He supplied me with many court documents and told me about his case against the Institute for Historical Review where he represented

Mel Mermelstien. This was the case in California where a judge took judicial notice that the Holocaust occurred, a fact disputed by the Institute. He told me about his background, which included several years in police work and Justice Department policymaking.

17. I spent the next several days writing first drafts of both the Carto and Yockey pieces. These were submitted to Jack Anderson for review and John Obert for rewrite.

18. Obert, and later Anderson, made several editorial changes in my work. It is standard procedure in Anderson's office to have three or four hands edit an article before it is finally published. Anderson and Obert had been covering Carto for years.

19. I met Cox again in the Hyatt on Sunday, July 19. He brought me up to date about his case and said his research about Carto and his practices was extensive. I showed him parts of the manuscript for fact-checking purposes. He assured me that the story was factually sound. Said he: "I think you have captured the essence of Carto in your piece."

20. I believed at the time and still believe that the articles I have written about Willis Carto and F. P. Yockey published in *The Investigator* were truthful and accurate reports.

21. I have prepared an appendix to this affidavit which lists the sources for the statements in the articles plaintiff's complain about. The appendix is forty-three (43) pages long and details the sources I relied upon. These sources are patently reliable. The ADL, William Buckley's National Review, congressmen, *The Washington Post*, *The Washington Star*, *True*, *The Los Angeles Times* and others have consistently and continuously reported that plaintiffs are anti-semitic, fascist and racist.

22. Reading *Imperium* is one way to see why all of the sources I investigated hold the same belief about plaintiffs. *Imperium* contains these words:

> "The Jew is a product of another Culture . . . This basic fact kept the Jew entirely separate from the West spiritually and racially -- the West rejected his world-feeling, he rejected its. Mutual hatred and mutual persecution only strengthened the Jewish race, sharpened its cunning and increased its resentment." (*Imperium*, p. 311-12)

On race, *Imperium* has this to say:

> "Thus the Negro in general rejects the white race, and the white race rejects the Negro. The Culture barrier is also present, for the Negro is below our Culture even though he has lived within its area for centuries." (*Imperium*, p. 313)

On political power, *Imperium* has this to say:

> "And although our job is to rebuild we must not lose sight of the reality, for we cannot rebuild until we have *captured* (emphasis is Carto's). Political power is the essential criterion . . . and to the goal of political power all else must be temporarily sacrificed. To say less is to insure defeat." (*Imperium*, Carto's introduction, p. XIX).

_____

Charles Bermant

Subscribed and sworn to
before me this 19th day
of August, 1982

_____

Notary Public

My Commission Expires November 14, 1984

APPENDIX TO AFFIDAVIT OF CHARLES BERMANT

Sources Relied Upon by Defendants With Respect to Plaintiffs' Allegations of Defamation

Set forth below defendants list each sentence from the article which plaintiffs' complaint alleges is false and defamatory. The plaintiffs' numbering system is followed, I through XXX. Immediately following plantiffs' claim of falsity, defendants set forth the sources relied upon for each such sentence.

Complaint, Paragraph 14,

(I): "America's Neo-Nazi Underground."

Plaintiffs allege this title to be false and defamatory.

Defendants relied upon, *inter alia*, the following sources in formulating that title:

> [F]or some time an organization whose leadership espouses great sympathy for Hitlerian Nazism, has been proselytizing a vicious and clandestine brand of anti-Semitism on 126 radio stations across the Nation. This organization, the Liberty Lobby . . . .

120 *Cong. Rec.* E. 4841 (daily ed.), Thursday July 18, 1974 (remarks of Rep. Eilberg) (reprinted, permanent ed. HR 24201, July 18, 1974).

> [T]he real insiders in Carto's apparatus belong to an explicitly Nazi group called the Francis Parker Yockey Movement . . . . [T]he Movement amounts to an *underground* which controls [Carto's] . . . other fronts and whose members flaunt swastikas, sing Nazi songs and quote Nazi slogans.

Trento and Spear, "How Nazi Nut Power Has Invaded Capitol Hill," *True* magazine, November 1969, at p. 35 (emphasis added).

> Carto has taken his philosophy as well as the name of his *underground* from Francis Parker Yockey . . . patron saint of America's Neo-Nazi's . . . ."

Id. at 37. (Emphasis added).

> Liberty Lobby is, in actuality, a front for Willis Carto's Neo-Nazi activities.

Id. at 39.

> The most powerful front [for Nazi activities] of all, Liberty Lobby . . . .

Id. at 122.

> The National Youth Alliance is now under the complete control of Carto and the Neo-Nazi Francis Parker Yockey Movement.

Id. at 124.

> [Carto] has, in Liberty Lobby, the nucleus for the American Reich.

Id.

> Carto "has begun, as Hitler did, with the establishment of an organization [Liberty Lobby] that preaches national unity but practices divisiveness and hate.

Mermelstein v. *Institute For Historical Review*, Declaration of William Cox [plaintiff's attorney] Regarding Urgency of Proceedings, Aug. 10, 1981, at 25.

> Nazism, like Carto himself, does not show its face, and hopes not to until it can show its fist.

Mermelstein v. *Institute For Historical Review*, Declaration of William Cox, *supra*, at 2.

> The money trees of which Willis Allison Carto is the creator and proprietor constitute a deep but not impenetrable forest, at the center of which is the tangled underbrush of a secret American Nazism

Id.

> Yockey suggested, also like Carto, that with a new hero, a Hitler reborn, an American majority can be forged to triumph where Hitler failed.

Id. at 9.

> At a party given in his [Carto's] honor by the 'Francis Parker Yockey Movement,' guests wore Nazi insignia, sang the 'Horst Wessel Lied' . . . .

Id. at 11.

> . . . crypto-Nazis of Carto's immediate circle.

Id. at 14.

> the first Nazis, the men Willis Carto admires most.

Id. at 16.

> Willis Carto leads organized anti-Semitism in the United States. His dream is to succeed the Fuehrer as savior of the 'Aryan race' in America and Europe.

Id. at 25.

Jeremy Horne joined Liberty Lobby as Research Director and was rapidly promoted to Corresponding Secretary and Circulation Manager for its publications; he found letters revealing Nazi, anti-Semitic, and racist leanings of Carto. Trento & Spear, *supra*, at 39.

> 'Hitler's defeat was the defeat of Europe. And America.'

Id. at 121 (quoting from Carto letter).

> Willis Carto was a dedicated Nazi.

Id. at 121.

> Many of [Carto's right-wing groups were] . . . fronts for this Nazi activities. The more extreme front members were introduced to Nazism . . . .

Id. at 122.

Carto is 'neo-Nazi.'

Id.

On January 25, 1969, at a National Youth Alliance (NYA) meeting in Monroeville, PA, which Carto attended, Nazi trappings were displayed and "Horst Wessel Lied" was sung. *Id*. at 124. In the words of one observer, "Carto tried to emulate the personal habits that Hitler had become famous for . . . . To his attentive listeners, he was Hitler reincarnated." *Id*.

At one NYA organizational party in honor of Carto, Nazi emblems were openly displayed and Hitler's *Horst Wessel* was sung by the guests.

Remarks of Rep. Eilberg, *supra*., at E 4841.

Years ago, Carto wrote to a fellow rightist, Norris Holt: 'Hitler's defeat was the defeat of Europe. And America . . . The blame must be laid at the door of the International Jews.'

Id.

"Horst Wessel Lied" sung after buffet supper on January 25, 1969. (*Horst Wessel* is a Hitlerian/Nazi song.)

Simonds, "The Strange Story of Willis Carto." *National Review*, September 10, 1971, at 986.

Willis Carto is a known admirer of Adolf Hitler.

Brin, "Propragandists Libel Holocaust at UCLA," Orange County Jewish Heritage, March 13, 1981.

'Carto wants a nationalist socialist dictatorship' in the United States, a former Liberty Lobby executive told a reporter.

Chandler, "Debunkers, 'Of Holocaust linked to Right-Wing Extremists.' " *"Los Angeles Times,"* May 3, 1981.

(II): "But a more sinister neo-Nazi cabal, men of influence and cunning, lurk in the shadows."

Plaintiffs allege this statement to be false and defamatory.

See material cited above in response to plaintiff's paragraph (I), all of which applies here.

(III): "Thus Carto called his base organization the Liberty Lobby and even obtained tax exempt status for it."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon materials supplied by Robert Eringer that Liberty Lobby is a tax-exempt organization. [Defendants note that Liberty Lobby's Answers to Interrogatories admit that it pays no federal taxes.]

(IV): "The book Imperium, meanwhile, is circulated only among the elect. The admiration for Francis Parker Yockey is also a secret thing, and Willis Allison Carto hides in the shadows of reclusion and anonymity."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in making the above statement:

Imperium is obtainable through Liberty Lobby and other outlets of the Carto organization. Advertisements appear in *The Spotlight* and its readership is precisely that limited, homogeneous remnant -- or elect -- which Carto seeks to call to his cause.

Carto wrote a 35 page introduction to the second printing of Yockey's *Imperium* in which he called tht racist and blatantly anti-Semitic work, "Prophetic; the work of an intuitive seer." *Mermelstein the Institute For Historical Review*, Declaration of William Cox, at 9.

> Carto has taken his philosophy as well as the name of his underground from Francis Parker Yockey . . . patron saint of America's Neo-Nazis . . . . Carto was strongly influenced by Yockey . . . .

Trento & Spear, *supra*, at 37.

> A small and dedicated Far-Rightist Cult has sprung up about the figure of Yockey since his death, with Carto at its center and *Imperium* as its holy book.

"Facts," Anti-Defamation League of B'nai B'rith, July 1968, (Volume 18, No. 2), at 464.

> [B]ehind the scenes, and often far away (Los Angeles), there is a more elusive figure -- with a passion for anonymity -- who is the real boss of Liberty Lobby . . . . Carto . . . .

Id. at 459.

> Liberty Lobby's "founder and silent leader is Willie A. Carto.

Id.

> Carto has . . . made a policy to keep his name far in the background, or missing entirely, when Liberty Lobby is concerned . . . .

Id.

> Carto was "living like a recluse in the basement of the Liberty Building. . . .

Simonds, *supra*, at 990.

> Nazism, like Carto himself, does not show its face, and hope not to until it can show its fist.

Mermelstein v. *Institute For Historical Review*, Declaration of William Cox, *supra*, at 2.

In "Power Base For Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," *Washington Post*, May 16, 1977, Carto is called "reclusive," (p. A-1), and is said to operate in Liberty Lobby's "background," (A-2).

(V): "Why does the Anti-Defamation League believe Carto's 'outreach makes him the leading anti-Semite in the country'?"

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon a statement made in an interview by Irwin Suall. Publications by the ADL verify this statement:

> Charges by the ADL, . . . accused Carto of setting up Liberty Lobby as a 'front' for his seamier operations, including Liberty & Property, a clearinghouse for keeping informed on anti-Semitic activities; 'Western Destiny,' a magazine with racist, Nazi-type articles and 'Noontide Press,' publisher of anti-Semitic, racist and pro-Nazi books, including 'Imperium,' by the late Nazi apologist Francis P. Yockey. The Yockey book contains a dedication to Adolf Hitler and a laudatory 35-page introduction by Carto.

Press release, ADL of B'nai B'rith, pp. 1-3.

> *The Spotlight*, Liberty Lobby's principal newspaper, disseminates an array of racist, anti-Semitic propaganda reflecting the prejudice of its publisher, Liberty Lobby, a Washington-based far-right extremist organization. It is this effort to camouflage the true bigotry of its pages and to deceive its readers that make *The Spotlight* more insidious than other publications of its kind -- and distinguishes it from the crudest, more blatant hate sheets of the neo-Nazi organizations and Ku Klux Klan groups plaguing the American scene. Liberty Lobby, headed by Willis A. Carto, a long-time anti-Semite and its founder and treasurer. . . .

Press release, Gans, "Spotlight on Hate," June 20, 1980, ADL of B'nai B'rith.

The ADL's "Facts," (vol. 18, No. 2) (July, 1968) stated:

> Willis A. Carto was the organizer and is still the main moving force behind [Liberty Lobby's] myriad activities. Carto . . . has also maintained significant ties with the demi-world of anti-Semitic propagandists in America.

"Facts" *supra*, at 459.

> "Zionism" has long been the operational euphemism for Judaism, and "Zionists" for Jewry, in the vocabulary of many anti-Semites. And while the Liberty Lobby stated clearly that Zionism is not a religious movement, its attack was aimed generally at America's Jews.

Id. at 463.

(VI): "And why did the late Drew Pearson describe Carto as a 'Hitler fan' and claim Liberty Lobby was 'infiltrated by Nazis who revere the memory of Hitler?' "

Plaintiffs allege this statement to be false and defamatory.

Defendants relied, *inter alia*, upon the following in making the above statement:

> While the nation has been preoccupied with the communist menace, a nest of Nazis has infiltrated Washington. . . . The ringleader is Willis Carto.

"Pearson-Anderson Special Weeklies," Release Monday, April 21, 1969.

> Liberty Lobby is an "organization of the fascist right, while Carto, founder of the Liberty Lobby, is the big wheel in the neo-Nazi movement.

"MGR [Drew Pearson's 'Merry Go Round'] For Rel[ease] Monday, June 9, 1969.

(VII): "Everything he does seeks to destabilize society. His panic mailings, survivor-group propaganda approach creates a climate of fear and danger. And it is only within such climate he will be able to seize the real political power he seeks."

Plaintiffs allege this statement to be false and defamatory.

Page 23 of the Bermant article on Carto attributes the allegedly offensive phrase to "an attorney who has dealt with [Carto] in court." The attorney who so described Carto and his activities is William Cox, attorney for Holocaust survivor Melvin Mermelstein.

(VIII): "Why does Scott Stanley, the managing editor of the John Birch Society's *American Opinion*, say, 'In my opinion, the preservation of anti-Semitism as a movement has occurred because of the activities of Willis Carto?' "

Plaintiffs allege this statement to be false and defamatory.

Defendants relied on Robert Eringer's information concerning Stanley's statement and the above materials regarding anti-Semitism.

(IX): "Last, but perhaps most pertinent why did Willis Carto choose a neo-fascist to be his inspiration and role-model?"

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon Yockey's *Imperium* and on Carto's introduction to that book, *inter alia*, to establish that Carto admires and reveres the memory of Yockey. It is abundantly evident from the sources quoted above and from *Imperium* that Yockey was a "neo-fascist." It is also clear that Carto saw Yockey as an inspiration and role-model. The following is from Carto's introduction to *Imperium*:

> Dimly, I could make out the form of this man [Yockey] this strange and lonely man. . . . I knew that I was in the presence of a great force, and I could feel History standing aside me.
>
> * * *
>
> Twice, I attended the [Yockey] hearings, and each time was fascinated by this man, Yockey. . . . As his [Yockey's] gaze swept across, and then to me, he stopped and for the space of a fractional second, spoke to me with his eyes. In that instant we understood that I would not desert him.
>
> * * *
>
> Is America a free country when a sensitive genius [Yockey] can be held in the filthiest of jails with Negro and White criminals . . . a sincere patriot like Francis

> Parker Yockey, whose every thought and effort was in behalf of his fellow man?

(X): "After drifting from one right-wing group to another, he decided to organize 'A lobby for patriotism' he would call Liberty Lobby."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied, *inter alia*, upon the following in making the above statement:

> After serving as a debt collector for the Household Finance Corporation during the mid 1950s, Carto was or became, a director of the "Libertarian Congress of Freedom", executive secretary of "Liberty and Property," (an anti-Semitic group), and formed the "Joint Council for Repatriation") (for the deportation of American Blacks to Africa).

Mermelstein v. *Institute for Historical Review*, Declaration of William Cox, at 4-5.

> By 1962, Carto 'had become' involved in over thirty right-wing groups, 'many of them fronts for his Nazi activities.'

Trento & Spear *supra*, at 122.

Carto's movement to and from these various groups and activities is described by the verb "drift". Webster's New World Dictionary (2d Coll. ed., 1980), defines the verb "to drift" as "1. to be carried along by or as by a current 2. to be carried along by circumstances. . . ." It was and is defendants' conclusion that use of the verb "to drift" fairly and accurately describe Carto's movement from one ultra-right group to another during the period in question.

(XI): "About this time, Carto moved his operations into a rented thirty-room Edwardian building on the corner of Independence Avenue and Third Street in Washington, D.C. The building now is owned by the Government Educational Foundation, which charges Liberty Lobby $6,000

a month rent. The Chairman and owner of the Foundation is Willis Carto . . . ."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon information supplied by Robert Eringer and upon the following:

> GEF [Government Educational Foundation] is Liberty Lobby's landlord . . . it owns the building in which the lobby is housed.

"Power Base For Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," *Washington Post*, May 16, 1977 p. A-2.

> Purchaser in 1965 and sole owner since 1969 of Liberty Lobby's building at Third Street and Independence Avenue is the Government Education Foundation (GEF). Carto signed as Chairman of GEF when GEF purchased the Liberty Lobby building.

Simonds, *supra*, at 988.

(XII): ". . . The Spotlight, which today boasts 335,000 readers . . . ."

Plaintiffs allege this statement to be false and defamatory.

Plaintiffs own publication, *The Spotlight*, stated in its January 5 & 12 [sic], 1981 edition, that *Spotlight* has a "grand total of 345,000" subscribers. ("In 1980 You Got The News the Establishment Tried to Hide.")

(XIII): "He . . . conducts his business by way of conference calls from a public telephone . . . ."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon information provided by Robert Eringer.

(XIV): "In 1968, another Carto 'front' organization called United Republicans for America used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon information supplied by Robert Eringer for the content of their statements concerning Carto's activity in Liddy's 1968 campaign, and upon the statement of William Cox:

> A sub-group of Liberty Lobby and a part of the Carto empire is 'United Republicans of America (which is not a Republican Party organization but is, rather, aimed at a takeover of the Republican Party).'

Mermelstein v. *Institute for Historical Review*, Declaration of William Cox, *supra*, at 2.

(XV): "In the mid-50's when Carto was drifting from one right wing organization to another he . . . organized and promoted the Joint Council for Repatriation. What he meant by 'repatriation' was the forced deportation of all blacks to Africa."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in making the above statement:

> Liberty Lobby's 'Public Policy Proposals include schemes for sending American blacks back to Africa.

"The Liberty Lobbyist," Editorial, *Washington Star*, April 24, 1981.

Carto tried to launch the "voluntary" repatriation of blacks to Africa. "Power Base for Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," *Washington Post*, May 16, 1977.

The *National Review* had this to say about Carto's racial attitudes and prejudices:

> Carto expressed his views on racial purity more frankly in private correspondence:
>
> The danger of "racial mongrelization" was not a new preoccupation for Carto. All through the years with

Liberty and Property, he corresponded tirelessly with segregationist leaders. In 1956, in a letter to Judge Tom P. Brady of the Mississippi Supreme Court, an originator of the White Citizens' Council, Carto proclaimed: "THE ISSUE IS NOT IDEOLOGICAL. THE ISSUE IS ETHNOLOGICAL."

"The revolutionists have seen to it," Carto wrote the racist author Earnest Sevier Cox in 1955, "that only a few Americans are concerned about the inevitable niggerfication of America." But Carto had a plan, for a "flank attack." He established, and promoted secretly the Joint Council for Repatriation -- a send-'em-back-to-Africa movement with an added benefit: ". . . such a movement would be the strongest blow against the power of organized Jewry that can be imagined."

Carto always had his eye on Jewry. From a letter to one Norris Holt:

> There are 600 million Chinese and about 200 million Russians. All united in a determination to destroy the West. And we have been so misled that we live in a dream world -- far away from reality. Hitler's defeat was the defeat of Europe. And America. How could we have been so blind? The blame, it seems, must be laid at the door of the international Jews. It was their propaganda, lies and demands which blinded the West as to what Germany was doing.

Carto put it all more succinctly in a memo to himself:

> Who is using who? Who is calling the shots? History supplies the answer to this. History tells us plainly who our Enemy is. Our Enemy today is the same Enemy of 50 years ago and before -- and that was before Communism. The Communists are "using" the Jews we are told . . . who was "using" the Jews fifty years ago -- one hundred or

> one thousand years ago. History supplies the answer. The Jews came first and remain Public Enemy No. 1.

The indefatigable Willis Carto had yet another project cooking in the late Fifties. In January 1957 he wrote to Judge Brady:

> Now Judge, I do not think that I have ever mentioned to you that for over a year I have been working on something tentatively called the LIBERTY LOBBY. Briefly, this involves the establishment of an office in Washington to lobby for patriotism . . . you can readily see the tremendous importance to the Repatriation scheme if this LOBBY ever gest [sic] set up. On the other hand, you can see that there must never be an obvious connection between the two, for if there is, either would kill the other off, or at least harm it very gravely. Therefore, I have had to make a decision and it is that the logical thing to do is to become publically [sic] identified with the LOBBY only. . . .

In the mailing to seven hundred conservatives, Carto outlined his plan for a "pressure group for patriotism," and sought to raise $75,000. By January 1958 only $15,000 had been raised; however, Liberty Lobby set up a "research department" July 4, in the offices of the American Council of Christian Laymen.

Simonds, *supra*, at 979.

In a letter to Holt, ["an extreme right-wing leader in Sausalito, California"], Carto wrote:

> Please don't do anything to publicize the JCR [Joint Council for Repatriation of Negroes Back to Africa] yet. I want to keep it as quiet as possible until we get a good, strong group behind us. To come out prematurely might mean immedate smears and destruction

by the J's. If there are some strong men behind us, they won't be able to do that. . . .

(XVI): "And Birch Society editor Scott Stanley notes that 'Whenever you find anti-Semitic literature coming from some little fly-by-night front, it seems to be associated with the Carto network.' "

Plaintiffs allege this statement to be false and defamatory.

Defendants relied on the quote supplied by Robert Eringer and the above materials relating to anti-Semitism.

(XVII): Illustration: "Carto often observes interviews of prospective employees through a mirror."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied on information supplied them by Robert Eringer.

(XVIII): ". . . Jeremy Horne, a veteran member of the Liberty Lobby staff."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in formulating the above description:

> Had it not been for a conscientious conservative named Jeremy Horne, Carto might still be regarded as just another right-wing extremist. Horne joined Liberty Lobby as a research director in April, 1966. Within months, he worked his way up to corresponding secretary and circulation manager for its numerous publications. He heard rumors around Liberty Lobby headquarters that Carto wasn't the legitimate conservative he tried to appear.

Trento and Spear, *supra*, at 39.

> Horne subsequently found racist and anti-Semitic correspondence between Carto and other Liberty Lobby insiders. Horne turned over that information to the FBI and to columnists Drew Pearson and Jack

> Anderson. It is implied and not stated in the quoted source material that Horne left shortly thereafter.

Id. at 39 and 121.

(XIX): "Illustration depiciting a man bearing a strong resemblance to Adolf Hitler, with Hitlerian moustache and right hand raised in the unmistakable suggestion of a Nazi salute, captioned "Carto, whose speeches were once a staple of ultra-right gatherings, no longer speaks in public." (Quoted from Complaint.)

Plaintiffs allege this illustration to be false and defamatory.

The illustration does not show a man making a Nazi salute. It was based on an actual photograph of Willis Carto. But even if plaintiffs believe it is their version of a Nazi salute, defendants have reliable grounds for believing Carto would give a Nazi salute.

> An observer at the National Youth Alliance meeting in Monroeville, Pennsylvania on January 25, 1969 stated, 'Carto tried to emulate the personal habits Hitler had become famous for. . . . [T]o his attentive listeners he was Hitler reincarnated.'

Trento and Spear, *supra*, at 124.

(XX): "Even more to the point, why would a man who says he is not anti-Semitic establish something called the Institute for Historical Review? The Institute, an integral part of Carto's West Coast operation, was set up to disprove that any Jews died in World War II gas chambers."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied, *inter alia*, upon the following in making the above statements:

> [A]s a fund-raising bulletin issued by the Institute says, 'the main focus' of the organization's research and education program has been the debunking of the so-called "Holocaust". . . .'

Mermelstein v. *Institute for Historical Review*, Declaration of William Cox, *supra*, at 3.

> The Institute for Historical Review has one mission: To persuade the world that Hitler did not and the Nazis did not carry out a systematic extermination of Jews.

"Holocaust is surely real, but the $50,000 may not be," *Long Beach Press-Telegram*, p. B-10.

(XXI): "After consulting with attorney William Cox, Mermelstein filed an application with the Institute within a few weeks. But 'Brandon' stalled, saying the Institute would first examine an application from famed Nazi hunter Simon Wiesenthal. Subsequently Wiesenthal withdrew his claim, and Mermelstein waited to testify. Instead, he was told that the Institute would not take up his claim until 'later.' Angered at being put off for so long a time after having been threatened to respond immediately or suffer the consequences, Mermelstein and Cox filed a million-dollar suit against the organization, saying they would prove in court that the Holocaust was fact, not hoax."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in making the above statement:

The Los Angeles Times contained the following commentary relevant to plaintiffs' paragraph XXI in its Sunday, May 3, 1981 edition:

> The director of the Institute for Historical Review [David McCalden, aka Lewis Brandon] has quit, admitting that he has concealed his true identity. And he says that a $50,000 reward the Institute offered was a publicity gimmick.
>
> * * *
>
> Brandon and his institute did not get much public attention until he offered a $50,000 reward to anyone who could prove that at least one Jew was gassed to death at Auschwitz, the death camp in Poland.

Two persons accepted the challenge and the Institute for Historical Review (IHR) has been re[ceiving] wide publicity as well as outrage from Jews around the world.

* * *

One of the two who accepted the reward challenge is Melvin Mermelstein, 54, a Long Beach businessman, who presented Brandon with an affidavit of his experiences at the Auschwitz and Birkenau camps in 1944.

* * *

On Feb. 19, Mermelstein sued Brandon, the IHR and a web of other persons and organizations tied to the institute. Mermelstein claims Brandon reneged on the reward offer.

Brandon, meanwhile, recently admitted to The Times and to subscribers that his real name is William David McCalden and that the reward was a gimmick to gain publicity for the institute's causes.

* * *

. . . McCalden told The Times that the IHR has ties to Liberty Lobby, a Washington, D.C.-based group that publishes allegedly racist materials.

Liberty Lobby is headed by Willis A. Carto. . . .

* * *

McCalden said he and Carto were involved in founding IHR here in the winter of 1978.

* * *

As director of the IHR, [Brandon] . . . earned $22,000. He acknowledged that Willis Carto is treasurer of Liberty Lobby and that Carto's wife Elisabeth who is German-born is treasurer of the Legion for the Survival of Freedom, the holding corporation for both

the institute and the publishing arm of the Carto operations known as Noontide Press.

* * *

. . . close connection between the Cartos and the institute. . . .

* * *

The IHR operated out of its Torrance warehouse and office without fanfare until this February, when Mermelstein filed his suit asking $17 million in damages for "injurious denial of established fact." The suit alleges that the institute breached a contract with him regarding proof of the Holocaust gassing.

Mermelstein was the first to apply for the $50,000 reward, offered originally at the "First Revisionist Convention" held in the summer of 1979. . . .

Contest rules included these conditions:

--Claimants were to attend at their own expense the "Second Revisionist Convention" . . . where they were to present evidence. . . .

--A tribunal of experts, picked up by the IHR, was to determine the validity of the testimony and evidence presented.

--Claimants were asked to give their "ethnic origin" and answer questions such as, "Were you an eyewitness to the gassing operations?" and "Did you keep a dairy [sic] or take photos?"

Mermelstein was not the reward's only claimant.

Famed Nazi-hunter Simon Wiesenthal, the Austrian credited with tracking scores of Nazi war criminals since World War II, applied in January of 1981.

McCalden, apparenly wanting to achieve greater publicity for the IHR by taking on Wiesenthal, wrote Mermelstein's attorney that he would deal with

Mermelstein's claim after the institute had decided Wiesenthal's. Wiesenthal, convinced that the judges chosen by the IHR would be biased, on March 4 wrote "Brandon" that he was withdrawing.

Meanwhile, Mermelstein, claiming that he had submitted required proof that Jews had been gassed, had already sued.

* * *

In a letter dated April 16, 1981, to subscribers to the Journal of Historical Review, Brandon said the $50,000 reward was "our No. 1 gimmick" to obtain publicity for institute activities.

"No one pretended that the reward was an academic exercise, . . . but at least it could attract attention to our genuine academic exercises. . . . All we needed was some naive zealot to walk into our trap. And even though we had to artificially extend the duration of the reward in the process, we did eventually attract the most eminently suitable mouse into our richly baited trap!"

The "mouse" was an apparent reference to Nazi-hunter Wiesenthal.

In the previous Revisionist Newsletter, however, "Brandon" asserted: "Should we lose this case (the Mermelstein suit) the Institute . . . is finished. Make no mistake about that." He also pleaded for subscribers to contribute money for legal defense.

Chandler, " 'Debunkers' of Holocaust Linked to Right-Wing Extremists," *Los Angeles Times*, Sunday, May 3, 1981, at Part 1, pp. 3, 19, 20.

Carto was a founder of the Institute for Historical Review (IHR). "Auschwitz Survivor Suing For $50,000 Prize in Dispute on Nazis' Gassing, *New York Times*, March 11, 1981.

The racism of the most visible Carto organizations is masked by an apparent respectability. Nowhere has Carto sought that respectability more than in the Institute for Historical Review. . . . The institute is described in its publications as "a non-profit educational foundation" established in 1978 "to investigate the positive causes and nature of war, and to disseminate those findings." Achieving white Anglo-Saxon supremacy is, for Willis Carto a "positive" cause of war. In the meantime, as a fund-raising bulletin issued by the Institute says, "the main focus" of the organization's research and education program has been the debunking of the so-called "Holocaust" which this bulletin alleges "is continually vaunted as the main 'reason' for America's dog-like devotion to the illegal state of Israel.

* * *

In fact, Willis Carto has goals more far-reaching than propaganda and persuasion.

The institute is but one arm of an organized, nationwide campaign of anti-Semitism and racism that has as its ultimate objective domination by a pure "Aryan" race of all North America and Europe under the leadership of Willis Allison Carto."

In this campaign, the plaintiff, Melvin Mermelstein, was selected as a specific target precisely because he was a survivor of the Holocaust and of the Nazi death camp at Auschwitz. In choosing him, the institute attacked a man who was extraordinarily vulnerable to anti-Semitism and, particularly, to assertions that he lied in bearing eye-witness testimony to the unspeakable cruelties of the Holocaust -- cruelties that have obsessed him since he saw his mother and sisters driven into the gas chambers at Auschwitz and since he discovered that he alone of his family had escaped Nazi oppression alive.

Whatever right Willis Carto has to lie about the Holocaust, he cannot with impunity turn the lie into a dagger aimed at the heart of a Holocaust victim whose

psychological vulnerability was intense and deep.

* * *

If Liberty Lobby is the base of Carto's operations, the Institute for Historical Review and the Legion for the Survival of Freedom are its heart. These are the organizations directly dedicated to clearing Hitler's name and persuading Americans that Francis Parker Yockey was right, and the world wrong, about the Nazi genocide of European Jews.

* * *

That is the message of the institute's Journal of Historical Review and "Revisionist Convention" conducted by the institute each year with the intention of revising history to erase the Holocaust from its pages. It was the message of a "reward" offered by the institute at the 1979 convention: $50,000 to anyone who could prove that Jews were killed in gas chambers at Auschwitz.

* * *

Carto embraced the idea and told McCalden ["Brandon," Director of IHR] the "reward" offer would be announced in a press conference after the 1979 "Revisionist Convention.

* * *

Melvin Mermelstein, "outraged," knew the gates of Hell that waited if Carto could first persuade millions that Hilter's deeds were fiction and could then turn Yockey's fantasy into deeds. Mermelstein wrote letters to the Press-Telegram, a daily newspaper published in Long Beach, California; to Jewish Heritage, a weekly newspaper published in Los Angeles; and to The Jerusalem Post, an internationally circulated English-language daily newspaper published in Israel. All three published Mermelstein's letter. The publication in the Jerusalem Post brought swift responses from Carto's "Liberty" empire employees and associates.

One response, an "Open Letter to a Racist and

Exterminationist," was widely circulated to Jews as well as to others. In it, . . . a member of the Editorial Advisory Committee of the Journal for Historical Review, accused Mermelstein of "peddling the extermination hoax," and of surviving the Holocaust through "pecuniary stealth" and through collaboration with the Nazis. Since [the author of that letter] . . . Carto and their associates contend in the Journal for Historical Review that no Jews were murdered by the Nazis, it is clear that this letter's infamous lies could only have been contrived to damage Mermelstein's reputation and to inflict the most grievous personal wounds. Mermelstein separated from his father and brother at Auschwitz at his father's bidding. To suggest that the separation that saved his life was collaboration with the Nazis who killed his mother and sisters, and who almost certainly killed his father and brother, was to strike Mel Mermelstein at the most vulnerable, the most easily penetrated part of his personal armor. It was a sadistic stroke worthy of the first Nazis, the men Willis Carto admires most.

* * *

March 20 -- A letter from the institute to William Cox proposed that Mermelstein's evidence be considered at the institute's "Revisionist Convention" November 20-23 at the University of California's Lake Arrowhead Conference Center.

March 31 -- A letter to the institute from Cox noted that the institute had apparently expanded the proof desired from Mermelstein to include evidence that gassing of Jews was an official policy. The letter also noted that when the summons and complaint were served on March 17 to a person who acknowledged himself to be David McCalden, that person "refused to acknowledge himself to be 'Lewis Brandon.' " The letter added: "I must ascertain with some greater degree of certainty who it is with whom I correspond. . . . If your answer is not filed with the Superior Court by

April 17, 1981, I intend to take action to receive a default judgment on the proceedings."

April 16 -- a letter from "Lewis Brandon" to subscribers to the Institute for Historical Review described the $50,000 "reward" offer as "our No. 1 gimmick," and declared further:

The reward was a gimmick to attract publicity; and it was a gimmick that worked! All we needed was some naive zealot to walk into our trap. . . .

* * *

July 13 -- an article headlined "Exterminationist refuses Offer" was published in Carto's weekly newspaper, The Spotlight. This article alleged, falsely, that "Mel Mermelstein, peripatetic holocaust 'witness,' has refused a continuing offer by the Institute for Historical Review (IHR) to consider his claim for the $50,000 reward offered by the institute to the first person who can prove that Jews were gassed in gas chambers at Auschwitz." The article further alleged, falsely, that Mermelstein "launched a publicity blitz under the guise of a $17 million lawsuit."

In fact it was the Institute for Historical Review that had, having pressed Melvin Mermelstein for a quick acceptance of its challenge, then refused to give Mermelstein's application timely consideration. It was the institute whose director declared that the "reward offer" was a "publicity gimmick." But having engineered a confrontation that was to plunge Mermelstein into deep mental anguish, having aimed the dagger of a lie at his victim's heart, Willis Allison Carto used the most widely circulated of his publications and another lie to twist the dagger.

Melvin Mermelstein resisted. He feels an obligation to resist. The necessity of such resistance is suggested in *The Informed Heart*, a book in which Dr. Bruno Bettelheim, himself a former Nazi concentration camp prisoner, discusses that experience and the psychology of its perpetrators and victims.

* * *

> A "Reward" offer that started as a "publicity gimmick" became a weapon for Willis Carto and a matter of honor for Melvin Mermelstein. The weapon continues to function so long as resolution of this dispute is delayed. While there are delays, Mermelstein is likely to suffer continued depression that will cause continuing damage to his family relationships and to his ability to perform effectively in his business. A swift adjudication of the matters at issue would enable him to resume the peaceful, secure life that was interrupted by the challenge from the Institute for Historical Review.

Mermelstein v. *Institute for Historical Review*, Declaration of William Cox, *supra*, 3-4, 11-12, 15-19, 22, 26.

(XXII): "Outraged over whistle blowing by people who had worked for him, Carto turned to lie detector and voice stress tests to ensure loyalty and operational security. Each new employee now must sign that they are willing to take such tests at any time. Refusal constitutes grounds for dismissal."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in making the above statement:

"Vandalism and thefts led to the institution of lie detector/polygraph tests." "Power Base for Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," *Washington Post*, May 16, 1977 at p.A-3.

> In May 1970 all employees were ordered to take lie detector tests. They were asked if they had stolen money or lists, or had been in contact with the FBI or ADL.

Simonds, *supra*, at 989.

Robert M. Bartell, Chairman of Liberty Lobby's Board of Policy, stated in a June 11, 1981 interview with reporter

Bermant that lie detector and voice stress tests were instituted to insure "loyalty and operational security." He indicated that refusal to take such tests would be grounds for dismissal. Responding to Mr. Bermant's question on how applicants are "screened for employment by Liberty Lobby, Bartell stated:

> Because of the nature of our institution, it is important for us to attempt to force out any infiltrator that might come in . . . . And as in every business of this nature there are people who want to know more than they can find out simply by talking or belonging or being involved. Because of this we instituted a polygraph test for all our employees. Everyone who comes to work signs an agreement that they are willing to take the polygraph. In recent years the test has utilized the stress analysis rather than the lie detector machine, and does it play an important part in our organization? Yes, we've caught people stealing from us and selling information about our organization to other people. There was no question of guilt. It was ascertained and subsequently proven, so it plays an integral part not so much in the standpoint . . . we know the test is embarrassing for some people . . . ." I don't have anything to hide or I wouldn't be here" that sort of thing . . ., but when strange and unexplainable things happen and point to a leak or situations that are uncomfortable for us, then we use the voice stress analysis. It's important from that standpoint. It's not the kind of thing where everyone who comes in gets a voice stress test.

Asked if such a test is a condition of employment by Liberty Lobby, Bartell stated, "yes, it is a condition of employment." And when asked if hiring was subject to the taking of such a test, Bartell reiterated:

> Yes, subject to it . . . They must agree before they're hired. They understand that. We're depriving

> them of no rights. If you don't want to take the test, you don't take the test. If you want the job . . . you have to be subject to it.

Then, asked whether a Liberty Lobby employee who subsequently refused to take a lie detector or voice stress test would be fired, Bartell responded:

> I would say the chances are pretty good . . . unless there's a pretty substantive reason why they can't or there's knowledge on our part there could be no participation on what we're trying to figure out. There are exceptions to the rule, but unless that . . . we have to take the attitude they've got something to hide.

(XXIII): "Liberty Lobby often hires outside consultants to conduct interviews, with Carto watching through a one-way mirror."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied on information supplied by Robert Eringer. [Defendants note that plaintiff's answers to interrogatories admit that three outside consultants have been retained to conduct polygraph exams of employees. Interrogatory Answer 15.]

(XXIV): "The ADL called it a plan to establish a right-wing military dictatorship."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied on information supplied by Irwin Suall of the ADL and the following additional information:

Operation Survival appears to have been an ongoing project of the Liberty Lobby. Liberty Lobby's twentieth anniversary convention occurred in 1975.

> Survival was the topic that occupied two closed sessions of the convention, where the Liberty Lobby's revived 'Operation Survival' policy was presented to the delegates for eventual approval by the 25,000 voting members.

> The 19-page policy statement, a guide to survival of the envisioned collapse of American society and [sic] pictured looters, rapists and killers terrorizing the countryside.
>
> The manual stressed the need for conservatives to prepare for the Holocaust by now forming "survival groups" that would store weapons, gold and silver and dehydrated foodstuffs.

"Birthday Marked By Liberty Lobby," *New York Times*, March 9, 1975.

> At its 20th anniversary convention in Torrance in 1975 the Liberty Lobby unveiled its "Operation Survival" policy, a 19-page guide to surviving the envisioned collapse of U.S. society when murderers, rapists and looters will swarm throughout the countryside terrorizing all but prepared patriots.
>
> * * *
>
> Disaster is due, they say, because of the rise of international communism, the establishment of the state of Israel and the inter-racial atmosphere of the United States.

Haas, "Liberty Lobby, gun merchant hold seminar," Torrance, California, Daily Breeze, Sunday April 26, 1981, at A-3.

(XXV): "In this scrutiny of Willis Carto and what he represents, five of the characteristics John Roy Carlson said identify inherent or incipient fascism have manifested themselves in greater or lesser degree. They are: a virulant anti-Semitism to dissolve the social fabric; the pitting of group against group and race against race to weaken national unity; incessant Red-baiting to smoke screen fascist propaganda; super patriotism and a perverted brand of nationalism; and the creation of a 'survivor mentality' to further fragment society. Three other characteristics are also evident in the Carto record; the use or lies and half-truths to win the support of the politically ignorant; adulation of

Adolf Hitler; denigration of democracy and agitation for an authoritarian New Order."

Plaintiffs allege this statement to be false and defamatory.

The following documentary excerpts used by defendants indicate that Carto is, in fact, described correctly by the characteristics Carlson enumerated. Carto,

> buys the Yockey [Nazi] lien on the Jews.

Simonds, *supra*, at 981.

> Carto and the Liberty Lobby are latently racist and fascist. Here the evidence was pretty nearly undeniable.

Id., at 987.

> Carto, in a letter to an associate concerning a new tabloid, stated: "I think there should be more stuff in it about the Wall Street jew . . . ." Concerning underground newspaper editors of the left pictured in *Time*, Carto stated, "[e]ach of them was a particular type of Jew."

Id., at 989.

> Carto is involved in the publication of racist and anti-Zionist literature.

"Power Base for Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," *Washington Post*, May 16, 1977, at p.A-1.

> The money trees of which Willis Allison Carto is the creator and proprietor constitute a deep but not impenetrable forest, at the center of which is the tangled underbrush of a secret American Nazism.

Mermelstein v. *Institute for Historical Review*, Declaration of William Cox, *supra*, at 2.

> The racism of the most visible Carto organizations is masked by an apparent respectability . . . . Achieving

white Anglo-Saxon supremacy is, for Willis Carto, a 'positive' cause of war.

Id., at 3.

In fact, Willis Carto has goals more far-reaching than propaganda and persuasion. The Institute [*i.e*. for Historical Review] is but one arm of an organized, nationwide campaign of anti-Semitism and racism that has as its ultimate objective domination by a pure 'Aryan' race of all North America and all Europe under the leadership of Willis Allison Carto.

Id. at 4.

Yockey, like Carto, declared that Hitler and Germany failed in their historic mission because of the Jews. Yockey suggested, also like Carto, that with a new hero, a Hitler reborn, an American majority can be forged to triumph where Hitler failed.

Id., at 9.

. . . crypto-Nazis of Carto's immediate circle.

Id., at 14."

the first Nazis, the men Willis Carto admires most.

Id., at 16.

It is Willis Carto's self-decreed mission to multiply into a majority the number of Americans who share that Hitlerian concern, [of the "niggerfication of America," [(Carto's words)].

Id. 24-25.

Willis Carto leads organized anti-Semitism in the United States. His dream is to succeed the Fuehrer as savior of the 'Aryan race' in America and Europe.

Id., at 25.

The following is taken from 120 *Cong. Rec.* E. 4841 (daily ed., July 18, 1974) (remarks of Rep. Eilberg):

> An outspoken anti-Semite who has professed an abiding admiration for Hitler and Nazi Germany and has been the moving force behind a network of Jew-hating organizations and publications over the years is also the unpublicized force behind "This Is Liberty Lobby," an extremist radio program carried five times a week by some 126 stations around the country.
>
> His name is Willis A. Carto.
>
> * * *
>
> Liberty Lobby was founded as a front for the seamier operations of Carto, among them Liberty and Property, a clearinghouse for keeping informed on anti-Sematic activities; *Western Destiny*, a magazine which published racist, Nazi-type articles, and Noontide Press, publisher of anti-Semitic, racist, and pro-Nazi books -- including "Imperium:," by the late Nazi apologist Francis P. Yockey, a book containing a dedication to Adolph Hitler and a laudatory 35-page introduction by Carto himself.
>
> Carto, 47 years old, began to work full time as a professional bigot and organizer in 1954 when he became executive secretary of Liberty and Property. A racist, as well as an anti-Semite, he complained while working for Liberty and Property, that "only a few Americans are concerned about the inevitable niggerfication of America." His 20-year career includes serving as a director of Congress of Freedom a right-wing, racist organization, and as an organizer for the John Birch Society.
>
> In 1966, Carto took over the venerable *American Mercury* name and placed it on the masthead of a quarterly devoted largely to anti-Jewish hate and issued in tandem with the semi-monthly *Washington Observer Newsletter*, similarly laden with unvarnished anti-Semitism.

* * *

In a 1967 U.S. Court of Appeals case brought by Liberty Lobby against columnist Drew Pearson -- which Liberty Lobby lost -- Judge Warren E. Berger (now Chief Justice of the U.S. Supreme Court) said the organization's activities reveal "overtones of anti-semitism and racism." [*See Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 n.7 (1968).]

* * *

In 1971, Liberty Lobby published a 40-page pamphlet, "America First," ostensibly an analysis of Middle East problems.

* * *

[T]he pamphlet is a tirade of hate blaming the Jews not only for Middle East crisis but for the crucifixion of Jesus, the Russian Revolution, and the two world wars. It questions the allegiance of American Jews and suggests that the only Jews who are loyal Americans are those few who are openly pro-Arab.

* * *

Years ago, Carto wrote to a fellow rightist, Norris Holt: "Hitler's defeat was the defeat of Europe. And America. . . . The blame must be laid at the door of the international Jews."

Carto has been associated with "anti-Semitic" and far rightist groups. Schrag, "America's Other Radicals," *Harper's*, August, 1970, at 44.

"Carto sees his media empire as a means of obtaining political power in order to effectuate his policies of racism." *Mermelstein v. Institute for Historical Review*, Supplemental Points and Authorities and Argument Regarding Corporate Liability, (dated Aug. 10, 1981), at 15.

Carto is "a self-avowed admirer of Adolf Hitler." Chandler, " 'Debunkers' of Holocaust Linked to Right-Wing Extremists," *Los Angeles Times*, May 3, 1981.

> 'Carto wants a nationalist socialist dictatorship' in the United States, a former Liberty Lobby executive told a reporter.

Id.

"Willis Carto is a known admirer of Adolf Hitler." Brin, "Propagandist Libel Holocaust at U.C.L.A.," Orange County Jewish *Heritage*, March 13, 1981.

> [B]ehind the scenes, and often far away (Los Angeles), there is a more elusive figure -- with a passion for anonymity -- who is the real boss of Liberty Lobby. . . . Carto . . . has also maintained significant ties with the demi-world of anti-Semitic propagandists in America.

"Facts," at p. 459, July, 1968, (ADL of B'nai B'rith, vol. 18, no. 2).

> Carto has a "vision of a fascist future."

Trento and Spear, *supra*, at 36.

> Through the Noontide Press in Sausalito, California, Carto publishes books which mock the Jews and extol Aryan culture.

Id.

> [T]he real insiders in Carto's apparatus belong to an explicity Nazi group called the Francis Parker Yockey movement. . . . [T]he Movement amounts to an underground which controls [Carto's] . . . other fronts and whose members flaunt swastikas, sing Nazi songs and quote Nazi slogans.

Id.

> Carto tells "his intimates" that [t]he problems of our civilization . . . are the fault of Jews and Negroes."

Id.

> Carto has taken his philosophy as well as the name of his underground from Francis Parker Yockey . . . patron saint of America's neo-Nazis. . . . Carto was strongly influenced by Yockey. . . .

Id. at 37.

> Liberty Lobby is, in actually, a front for Willis Carto's neo-Nazi activities.

Id. at 39.

Former Liberty Lobby insider Jeremy Horne found the following memorandum by Willis Carto:

> The strangest of all strange things and the most unfair of all unfair things brought on by Jewish control of American politics concerns the alleged recipient of buckets and buckets of hypocritical Jewish concern and sympathy -- the American Negro!
>
> Jewish control of so-called Negro-organizations like the NAACP and the Urban League is so complete and has been indentified so closely yet fraudulently in the public mind with the legitimate aims and aspirations of the American Negro that only a few white Americans realize the truth about the fantastic trickery which brought this about.
>
> Only a few Negroes are genuinely in accord with the troublemaking policies of these two race-mixing organizations. It is a sad, yet significant fact that both of these fraudulent outfits prosper by using the brains of Jews, the money of Jews and duped white Christians and the "front" of raceless mulatto figureheads. But hardy a Negro in the lot!

Id. at 121. Also in Carto's writings:

> Hitler's defeat was the defeat of Europe. And America.
>
> How could we have been so blind? The blame, it seems, must be laid at the door of the international

> Jews. . . . If Satan himself, with all the superhuman genius and diabolical ingenuity at his command, had tried to create a permanent element of disintegration and force for destruction of the nations, he could have done no better than to invent the Jews.

Id.

> [Carto] has, in Liberty Lobby, the nucleus for the American Reich.

Id.

> To [Carto], the words of *Mein Kampf* and *Imperium* seem quite sane. . . .

Id.

(XXVI): "The Spotlight's stock in trade are stories that purport to expose the 'Jew-Zionist' international bankers 'conspiracy against hard-working, bluecollar Americans.'"

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon information supplied by Robert Eringer, borne out by, *inter alia*, an article in the June 4, 1979 issue of *The Spotlight* entitled, "Megabankers Control U.S. Economy by Diverting Gas to Israel." The article states:

> [T]he gas shortage choking America and raising our inflation fever has been caused by Israel. This has provided the world-wide cartel with the opportunity not only to gouge you at the gas pump, but to seize control of the U.S. economy.
>
> Three knowledgeable European energy experts exclusively interviewed at length by The SPOTLIGHT's investigative team in New York City and Washington confirmed unanimously that the U.S. gas crunch has been staged by Israel in cahoots with the multinational corporations which control global energy supplies.

(XXVII): "Not long ago, a freelance reporter for *The Spotlight*, J. Michael Dunsmore, told *The Investigator* that a lead story in the May 21, 1979 issue of Carto's tabloid was a total hoax. . . . The story, written by Dunsmore under the pseudonym 'Tom Waits,' reported that a *Spotlight* reporter had traveled to Baden, Austria, for an April 1979 Bilderberg Conference. But Dunsmore now says neither he nor any other reporter for the paper went to Baden and that the reported conversation with a 'Bilderberg official' never took place."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon information supplied by Robert Eringer.

(XXVIII): ". . . Liberty Lobby was fined $11,000 by the Federal Election Commission. The FEC charged that *The Spotlight* articles expressly advocated the defeat of a clearly indentified candidate (Carter) and that promotion and distribution of the article by Liberty Lobby was illegal under federal election laws because Liberty Lobby is a non-profit corporation."

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the June 4, 1979 issue of *The Spotlight* which stated, on page 23, "Currently, the FEC [Federal Election Commission] is demanding that *The Spotlight* and Liberty Lobby pay an $11,000 fine for the 'no-no' of telling the truth about Jimmy Carter."

(XXIX): "Carto reportedly delivered a speech in which he attempted to emulate Hitler's style and charisma, and joined the audience in singing Hitler's 'Horst Wessel Lied.' "

Plaintiffs allege this statement to be false and defamatory.

Defendants relied upon the following in making the above statement:

> "Horst Wessel Lied" was sung after a buffet supper on January 25, 1969. Carto then gave a anti-Semitic speech to the gathering of Nazi sympathizers.

Simonds, *supra*, at 986.

> At a party given in his [Carto's] honor by the Francis Parker Yockey Movement, guests wore Nazi insignia, sang the 'Horst Wessel Lied' . . . .

Mermelstein v. *Institute for Historical Review*, Declaration of William Cox, *supra*, at 11.

> At one NYA [National Youth Alliance] organizational party in honor of Carto, Nazi emblems were openly displayed and Hitler's *Horst Wessel* was sung by the guests.

120 *Cong. Rec.* E 4841 (daily ed.), July 18, 1974 (extension of remarks of Rep. Eilberg).

> On January 25, 1969, at a National Youth Alliance Meeting in Monroeville, Pennsylvania, Nazi emblems were displayed and Hitler's "Horst Wessel Lied" was sung. In the words of one observer, "Carto tried to emulate the personal habits that Hitler had become famous for . . . To his attentive listeners, he was Hitler reincarnated.

Trento & Spear, *supra*, at 124.

(XXX): "Willis Carto once wrote that he organized Liberty Lobby to clean 'the Augean stables' and re-establish a government 'in consistency with American traditions.' But surely what Willis Carto perceives as 'American traditions' are not the traditions the late Adlai Stevenson had in mind when he said: 'What can we say for the self-styled patriot who thinks that a Negro, a Jew, a Catholic or a Japanese-American is *less* an American than he?' "

Plaintiffs allege this statement to be false and defamatory.

Defendants relied, *inter alia*, upon the following in making the above statement:

> Carto, in a letter to an associate concerning a new tabloid, stated: "I think there should be more stuff in it about the Wall Street jew . . . ." Concerning underground newspaper editors of the left pictured in *Time*, Carto stated, "[e]ach of them was a particular type of Jew."

Id., at 989.

> Carto is involved in the publication of racist and anti-Zionist literature.

"Power Base for Hard Right, Willis Carto: Liberty Lobby's Unseen Boss," *Washington Post*, May 16, 1977, at p. A-1.

> The money trees of which Willis Allison Carto is the creator and proprietor constitute a deep but not impenetrable forest, at the center of which is the tangled underbrush of a secret American Nazism.

Mermelstein v. *Institute for Historical Review*, Declaration of William Cox, at 2.

> The racism of the most visible Carto organizations is masked by an apparent respectability. . . . Achieving white Anglo-Saxon supremacy is, for Willis Carto, a 'positive' cause of war.

Id., at 3.

> In fact, Willis Carto has goals more far-reaching than propaganda and persuasion. The Institute [*i.e.* for Historical Review] is but one arm of an organized, nationwide campaign of anti-Semitism and racism that has as its ultimate objective domination by a pure 'Aryan' race of all North America and all Europe under the leadership of Willis Allison Carto.

Id., at 4.

> Under Carto's guidance the American Mercury. . . was turned into a thoroughly scruffy facist [sic] and anti-Semitic magazine. . . .

Id., at 7.

> Yockey, like Carto, declared that Hitler and Germany failed in their historic mission because of the Jews. Yockey suggested, also like Carto, that with a new hero, a Hitler reborn, an American majority can be forged to triumph where Hitler failed.

Id., at 9.

> . . . crypto-Nazis of Carto's immediate circle.

Id., at 14.

> the first Nazis, the men Willis Carto admires most.

Id., at 16.

> It is Willis Carto's self-decreed mission to multiply into a majority the number of Americans who share that Hitlerian concern, [of the "niggerfication of America," (Carto's words)].

Id., at 24-25.

> Willis Carto leads organized anti-Semitism in the United States. His dream is to succeed the Fuehrer as savior of the 'Aryan race' in America and Europe.

Id., at 25.

> The following is taken from 120 *Cong. Rec.* E. 4841 (daily ed.), July 18, 1974 (extension of remarks of Rep. Eilberg):
>
> An outspoken anti-Semite who has professed an abiding admiration for Hitler and Nazi Germany and has been the moving force behind a network of Jew-hating organizations and publications over the years is also the unpublicized force behind "This Is Liberty

Lobby," an extremist radio program carried five times a week by some 126 stations around the country.

His name is Willis A. Carto.

* * *

Liberty Lobby was founded as a front for the seamier operations of Carto, among them Liberty and Property, a clearing-house for keeping informed on anti-Semitic activities; *Western Destiny*, a magazine which published racist, Nazi-type articles, and Noontide Press, publisher of anti-Semitic, racist, and pro-Nazi books -- including "Imperium." by the late Nazi apologist Francis P. Yockey, a book containing a dedication to Adolph Hitler and a laudatory 35-page introduction by Carto himself.

Carto, 47 years old, began to work full time as a professional bigot and organizer in 1954 when he became executive secretary of Liberty and Property. A racist, as well as an anti-Semite, he complained while working for Liberty and Property, that "only a few Americans are concerned about the inevitable niggerfication of America." His 20-year career includes serving as a director of Congress of Freedom a right-wing, racist organization, and as an organizer for the John Birch Society.

In 1966, Carto took over the venerable *American Mercury* name and placed it on the masthead of a quarterly devoted largely to anti-Jewish hate and issued in tandem with the semi-monthly *Washington Observer Newsletter*, similarly laden with unvarnished anti-Semitism.

* * *

In a 1967 U.S. Court of Appeals case brought by Liberty Lobby against columnist Drew Pearson -- which Liberty Lobby lost -- Judge Warren E. Burger

(now Chief Justice of the U.S. Supreme Court) said the organization's activities reveal "overtones of anti-Semitism and racism," [*See Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489, 491 n.7 (1968).]

* * *

In 1971, Liberty Lobby published a 40-page pamphlet, "America First," ostensiby an anaysis of Middle East problems.

* * *

[T]he pamphlet is a tirade of hate blaming the Jews not only for Middle East crises, but for the crucifixion of Jesus, the Russian Revolution, and the two world wars. It questions the allegiance of American Jews and suggests that the only Jews who are loyal Americans are those few who are openy pro-Arab.

* * *

Years ago, Carto wrote to a fellow rightist, Norris Holt: "Hitler's defeat was the defeat of Europe. And America. . . . The blame must be laid at the door of the intenational Jews."

Carto has been associated with "anti-Semitic" and far rightist groups.

Schrag, "America's Other Radicals," *Harper's*, August, 1970, at 44.

Carto sees his media empire as a means of obtaining political power in order to effectuate his policies of racism.

Mermelstein v. *Institute for Historical Review*, Supplemental Points and Authorities and Argument Regarding Corporate Liability (dated Aug. 10, 1981), at 15.

Carto is "a self-avowed admirer of Adolf Hitler."

Chandler, " 'Debunkers' of Holocaust Linked to Right-Wing Extremists," Los Angeles Times, May 3, 1981.

> 'Carto wants a nationalist socialist dictatorship' in the United States, a former Liberty Lobby executive told a reporter.

Id.

> Willis Carto is a known admirer of Adolf Hitler.

Brin, "Propagandists Libel Holocaust at U.C.L.A.," Orange County Jewish *Heritage*, March 13, 1981.

> [B]ehind the scenes, and often far away (Los Angeles), there is a more elusive figure -- with a passion for anonymity -- who is the real boss of Liberty Lobby. . . . Carto . . . has also maintained significant ties with the demi-world of anti-Semitic propagandists in America.

"Facts," at p. 459, July, 1965, (ADL of B'nai B'rith, vol. 18, no. 2).

> Carto has a "vision of a fascist future."

Trento and Spear, *supra*, at 36.

> Through the Noontide Press in Sausalito, California, Carto publishes books which mock the Jews and extol Aryan culture.

Id.

> [T]he real insiders in Carto's apparatus belong to an explicitly Nazi group called the Francis Parker Yockey movement. . . . [T]he Movement amounts to an underground which controls [Carto's] . . . other fronts and whose members flaunt swastikas, sing Nazi songs and quote Nazi slogans.

Id.

> Carto tells "his intimates" that "[t]he problems of our civilization . . . are the fault of the Jews and Negroes."

Id.

> Carto has taken his philosophy as well as the name of his underground from Francis Parker Yockey . . . patron saint of America's neo-Nazis. . . . Carto was strongly influenced by Yockey. . . .

Id. at 37.

> Liberty Lobby is, in actuality, a front for Willis Carto's neo-Nazi activities.

Id. at 39.

Former Liberty Lobby insider Jeremy Horne found the following memorandum by Willis Carto:

> The strangest of all strange things and the most unfair of all unfair things brought on by Jewish control of American politics concerns the alleged recipient of buckets and buckets of hypocritical Jewish concern and sympathy -- the American Negro!
>
> Jewish control of so-called Negro-organizations like the NAACP and the Urban League is so complete and has been identified so closely yet fraudently in the public mind with the legitimate aims and aspirations of the American Negro that only a few white Americans realize the truth about the fantastic trickery which brought this about.
>
> Only a few Negroes are genuniely in accord with the troublemaking policies of these two race-mixing organizations. It is a sad, yet significant fact that both of these fraudulent outfits prosper by using the brains of Jews, the money of Jews and duped white Christians and the "front" of raceless mulatto figureheads. But hardly a Negro in the lot!

Id. at 121. Also in Carto's Writings:

> Hitler's defeat was the defeat of Europe. And America. How could we have been so blind? The blame, it seems, must be laid at the door of the international Jews. . . . If Satan himself, with all the superhuman

> genius and diabolical ingenuity at his command, had tried to create a permanent element of disintegration and force for destruction of the nations, he could have done no better than to invent the Jews.

Id.

Source Demonstrating that Plaintiffs Should Have Known Since 1969 of the Alleged Theft of the Records Identified in Count II of the Complaint

> Carto devised a system for controlling congressmen. Mrs. Sarah Shields Jobe, 77, once a prominent southern attorney, describes the system, which she unwittingly helped construct: "Carto asked me to do some research on a number of congressmen. He asked me to find out what secret organizations they belonged to. He asked me to find out if they were members of the Ku Klux Klan or the White Citizens Council. He called the file 'Kosher Konservative Kongressmen' -- or the KKK file. I guess he had 52 people in there. As time went on I learned that Carto was a Nazi and what he was using Liberty Lobby for. He was making a concerted effort to take over the conservative element of Congress via blackmail."
>
> Like Jeremy Horne, Mrs. Jobe was a responsible conservative, concerned that Liberty Lobby subscribers were being defrauded. She carted off Carto's files, which have been made available to *True*.

Trento & Spear, *supra*, at 122.

APPENDIX E
AFFIDAVIT OF WILLIAM C. McGAW

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC. and WILLIS A. CARTO, *Plaintiffs*	)	Civil Action No. 81-2240
v.	)	
JACK ANDERSON, et al., *Defendants*	)	

AFFIDAVIT OF WILLIAM C. McGAW

William C. McGaw, being first duly sworn, deposes and says:

1. I am a resident of El Paso, Texas. My present address is 138 Gibbs Street, El Paso, Texas 79907.

2. In October of 1980 I was employed by The Investigator Magazine as Editor. I remained in that position during the existence of the magazine.

3. The Investigator Magazine is located at 1717 Montana Ave., El Paso, Texas.

4. It was originally my idea to begin a magazine that would review information from several sources, investigate gaps in the information, and reduce it to terms that the average person could understand. I discussed the idea with Jay J. Armes, a private investigator, in May or June of 1980. I also discussed the possibility with William E. Adkins, Manager of the West Texas News Company. I also spoke with Jack Anderson about his doing a monthly article that would be exclusive and not a rehash of his columns. He told me that he had been interested in organizing a magazine of this sort and that he would be interested in participating even more in this project than we had discussed. And I could see where that could have a lot of benefit to us with his national reputation.

5. William E. Adkins, Jay J. Armes and myself became owners of the Investigator Publishing Company, incorporated in Texas, on or about October 1, 1980.

6. As I understood it, Anderson was to have veto power over any article under consideration and I agreed to this, although I was editor, because I could understand that a person with a national following could have conceivably sound objections to some articles that would be published under his name. He was to provide his staff to check out all stories and to perform similar duties. There was an agreement drawn up, however, between the corporate attorney, William Elias, and Anderson's attorney as to his position, his ownership and his editorial prerogatives. That agreement turned out to be contrary to what I had understood and I didn't know the full details of it until a meeting of directors on July 21, 1981.

7. The Board of Directors initially consisted of four men who were the stockholders of the Company -- Jack Anderson, William Adkins, Jay J. Armes and myself.

8. The officers were: William Adkins as President, Chief Executive Officer and Treasurer; Jay J. Armes as Vice President and myself as Secretary.

9. The first issue of the Investigator Magazine, dated September 1981, which was on the newsstands July 7, 1981, is the only issue over which I had any editorial control at all, and not a lot of that even then.

10. Anderson and Adkins were in editorial charge of the second issue dated October, 1981. I noticed that the second issue had a statement that did not appear in the first one: "The Investigator is published by the Investigator Publishing Company, Bill E. Adkins, President and Chief Executive Officer." This was a subtle shift of authority. By this time Armes and I had virtually nothing to do with the make-up or selection of stories in the Investigator.

11. Anderson originated the idea for the articles under the general heading of "America's Neo-Nazi Underground," entitled "Yockey: Profile of an American Hitler," and "The Private World of Willis Carto," which I shall refer to as the Carto/Yockey articles, which were published on pages 20

through 73 of the October, 1981, issue of The Investigator. He said someone had come to him with an inside article on The SPOTLIGHT and he wanted to know if we would pay $10,000 for it. I said, "It's ridiculous, it isn't worth $10.00," and asked him what the point was. That was in the winter of 1980-81, and then I thought it was forgotten about.

12. When I tried to include a book review in the September 1981 issue Anderson immediately vetoed it. Then when we came up two pages short and I had to get something to the printer immediately I went ahead and filled the two pages with the book review. Adkins phoned Anderson -- and this is what makes me think Adkins and he must have had some kind of understanding that I knew nothing about -- and told him that we had done this, which to me was a very simple thing, in an emergency especially. Anderson called me and was furious that I went against his orders. I explained to him that there weren't any orders and that it was an emergency situation and reminded him of the tremendous financial loss if we were to miss a printing date.

About the 20th of June it was decided that I would have to use Adkins as Anderson's advocate. In other words, Akdins was going to ride herd over me. I had to get clearance from Adkins constantly because apparently he and Anderson had some rapport as to how they were going to control everything. There had been a meeting in which they planned to vote me out as Editor because of our editorial differences. In effect, I was out from that time on because Adkins was in control. Although I retained the title of Editor by contract, I had no authority at all from that time on.

13. Also in June of 1981, before the first issue had ever gone on the stands, I received from Washington two manuscripts with the name John C. Obert on them. These were the Carto/Yockey articles. I called Adkins right away and said "These stories are ridiculous. They're terrible." Afterward Adkins told me that because of my criticism of the Carto/Yockey articles that Anderson was never again going to send another story to El Paso for me to criticize before it appeared in print.

14. On July 21, 1981, at a meeting where Adkins, Anderson and Armes and I were present, I objected to the publication of the Carto/Yockey articles, pointing out Yockey had been dead 20 years and the whole thing was grotesque. I said, "Look, Anderson has only veto power. He hasn't the power to put those articles in." It was then I learned from the Corporate Attorney Elias that Anderson had complete editorial control, according to his interpretation of the contracts.

15. During the meeting, Anderson re-affirmed that he had total control of the publication of stories in the Investigator, but didn't refer specifically to the Carto/Yockey articles until a break, when he came over to me and to Charlie Berg, managing editor, standing there, with maybe somebody else, and said, "I want to explain that story, why we are running that." I said, "Please do." Anderson said, "You know when I addressed a meeting of magazine distributors in New York, I noticed they were virtually all Jewish. And really the reason I am running these articles about Yockey and Carto is so that they'll be favorable toward us and give us a prominent display on newstands and supermarkets."

16. Adkins and Anderson put the second issue dated October 1981 of the Investigator together. That was the issue containing the Carto/Yockey article.

17. I was sent by accident, copies of some of the proof pages -- the brown lines -- prior to its publication, sometime around or shortly after July 21, 1981. I saw page 27 bore a picture of a mustached individual who was holding his hand up like Hitler. The cutline underneath the picture said, "Carto, whose speeches were once the staple of ultra-right gatherings, no longer speaks in public." The cutline indicated that the person in the picture, who looked like Hitler, was Carto. I called up The Investigator art director, Bernie Springsteel, who was in New York, and said, "Bernie, that's giving the wrong impression. You'd think this was Hitler. You've got Hitleresque features and you've got the name Carto underneath." I told the art director, "That could be libelous. You'd better get that off there." The art director told me, "It's already gone," referring to the article being sent to the printer.

18. Because of Adkins taking over, I had no authority to do anything other than point the false and what I believed to be a possibly libelous impression created by the picture.

19. During the preparation of the October 1981 issue of the Investigator Magazine, Adkins had a great deal to do with the editorial content of the magazine. He was giving instructions to Berg, the managing editor, as to what to do. And as soon as I got back Berg said, "Hey, this guy (Adkins) is doing everything contrary to what we had planned, and I thought you ought to know about it."

Adkins took part in meetings during which the content and editorial policies of the magazine were discussed and debated. He sided with Jack Anderson, who advocated, over my objections, the publication of the Carto/Yockey articles. He issued instructions and orders having to do with the contents of the October 1981 issue of the Investigator.

20. The foregoing facts are known by me to be true, of my own knowledge. I am competent to testify to such facts, and would so testify if I appeared in court as a witness at the trial of these matters.

William C. McGaw

Date: Jan. 7, 1982

I, Dorothy E. McGaw, a notary public in and for the State of Texas, do hereby certify that William C. McGaw personally known to me as the person whose name is subscribed to the above Affidavit, and swore and subscribed to the same before me.

Given under my hand and seal this 7th day of January, 1982.

Dorothy E. McGaw

DOROTHY E. McGAW Notary Public in and for the State of Texas My commission expires Dec. 18, 1984

APPENDIX F
AFFIDAVIT OF WINFIELD S. STANLEY, JR.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC. WILLIS A. CARTO, *Plaintiffs,* v. JACK ANDERSON, THE INVESTIGATOR PUBLISHING COMPANY, and BILL E. ADKINS, *Defendants.*	)	Civil Action No. 81-2240 Judge Parker

District of Columbia) ss.:

AFFIDAVIT OF WINFIELD SCOTT STANLEY, JR.

Winfield Scott Stanley, Jr., being duly sworn, deposes and says: This Affidavit is being given only because I was duly and properly subpoenaed by the Defendants for a deposition to be conducted on October 1, 1982 in Belmont, Massachusetts. The Defendants having given me the opportunity to respond via this Affidavit to two questions instead of being deposed, I have availed myself of this alternative.

Q. Are Liberty Lobby and Willis Carto anti-Semitic and racist?

A. One purpose of a front group is by emphasizing some worthy shared principle or cause to harness the prestige of respected and honorable people for purposes to which they would not otherwise lend themselves. So it is with the anti-Jewish and racist activities of Liberty Lobby. I have personally known members of Liberty Lobby who are neither anti-Jewish nor generally racist; Mr. Carto is clearly both. As leader of Liberty Lobby and its allied businesses and ventures he must be judged

responsible for their consistent encouragement of these themes. The two most recent issues at hand of Liberty Lobby's *Spotlight*, for example, carried long and glorifying interviews with convicted members of the Ku Klux Klan and a number of attacks on Jews under such assorted guises as Zionists and dual loyalists. This is typical of Carto publications. When *American Mercury* magazine was controlled by these people it was even more open in its attacks on Jews and Negroes, to the point of publishing a speech several years ago by Adolf Hitler. This group's Noontide Press, a publishing house, offers such works as the Naziesque *Imperium*, with foreword by Willis Carto, which attacks Jews under the guise of calling them the "inner enemy" and the "Culture Distorters." Noontide's list also contains a variety of tracts ranging from *Our Nordic Race* and *White America* to *The Importance of Race In Civilization* and *The Myth Of The Six Million*. The latter, says Noontide in its brochure, "proves the claim of deliberate genocide to be totally false." The book, said by the Noontide brochure to have been written especially for Carto's Noontide Press, argues that Nazi Germany did not exterminate Jews and that claims that Hitler put millions to death are lying Jewish propaganda.

Frankly, it had always seemed to me that the racist and anti-Jewish nature of the Carto enterprises was a matter of pride to their leader. There is assuredly no secret about it.

Q. Is it Mr. Stanley's opinion that "the preservation of anti-Semitism as a movement has occurred because of the activities of Willis Carto"?

A. The problems with the material you have placed in quotes are two: (1) Both Arabs and Jews are Semites. Carto promotes Arabs (and even Jews) who attack Israel or lend themselves to anti-Jewish activity. (2) Anti-Semitism as a movement has ancient roots in Europe and political significance in the Middle East which would exist had Mr. Carto never been born.

It is Mr. Stanley's opinion that the preservation of a professionally organized anti-Jewish movement in America would not have occurred without the activities of Willis Carto. And I respectfully ask the court to do whatever it can to prevent Mr. Carto from using that statement, given after subpoena and under oath, in his next fundraising letter.

CERTIFICATE

I WINFIELD SCOTT STANLEY, JR., do hereby certify that I have executed and read the foregoing AFFIDAVIT and it is true and accurate to the best of my knowledge and belief

/s/
(Winfield Scott Stanley, Jr.)

COMMONWEALTH OF MASSACHUSETTS

Middlesex, SS.

Sworn to and subscribed before me this 1st day of October, 1982.

/s/
(Gary R. Handy — Notary Public)

My Commission Expires: January 3, 1986

APPENDIX G
Affidavit of Willis A. Carto

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC. and WILLIS A CARTO,	:	
Plaintiffs,	:	Civil Action No. 81-2240
v.	:	Judge Parker
JACK ANDERSON, THE INVESTIGATOR PUBLISHING COMPANY AND BILL E. ADKINS,	:	
Defendants.	:	

AFFIDAVIT OF WILLIS A. CARTO IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

District of Columbia, ss:

Willis A. Carto, being first duly sworn, deposes and says:

1. I am the Treasurer of Liberty Lobby, Inc. and Chairman of its Executive Committee.

2. I have never worn a moustache, and I have never attempted to imitate Adolf Hitler's appearance or gestures or mannerisms.

3. To my knowledge, no picture of me except that published by *The Investigator* ever depicted me with a moustache or giving anything remotely resembling a Nazi salute.

4. I do not own and have never owned Government Educational Foundation. Government Educational Foundation is a non-profit corporation. Liberty Lobby, Inc. has never paid $6000.00 a month rent to Government Educational Foundation.

5. I have never made a practice of conducting business by conference calls from public telephone booths.

6. I have never made use of a one-way, see-through mirror for any purpose.

7. In March, 1970, I filed a libel suit against Joseph Spear, Joseph Trento, and Fawcett Publications, Inc. for a *True* magazine article which made numerous false and extremely damaging allegations about me. The article, "How Nazi Nut Power Has Invaded Capitol Hill," appeared in the November 1969 issue of *True*, and its authors were Joseph Spear and Joseph Trento. The suit was brought in United States District Court for the Western District of Oklahoma, No. Civil-70-197, under the caption, Willis A. Carto vs. Fawcett Publications, Inc., Joseph Trento and Joseph Spear.

8. The lawsuit was settled in 1970 because of payment of a sum of money by the defendants and their publication in *True* magazine of November 1970 of a compensatory article written to Liberty Lobby's specifications, many copies of which were supplied free of charge to Liberty Lobby as one of the terms of my dismissal of the libel suit. A copy of the compensatory article, which I swear and certify to be complete and genuine, is attached to this Affidavit as Exhibit A.

9. Attached hereto as Exhibit B is an Affidavit of Sarah Shields Jobe which she wrote and executed on October 17, 1969 in response to the *True* article for which I brought suit. A copy of her Affidavit, which denies substantially the same story about her which was retold in the October 1981 issue of *The Investigator*, was sent to *True* magazine's editor by the general counsel of Liberty Lobby on December 5, 1969 -- a fact which I know to be true of my own personal knowledge.

10. Without taking the space to deny the dozens of utter falsehoods published about me in the October 1981 issue of *The Investigator*, I shall state categorically that I am not and never have been a Nazi.

The foregoing facts are known by me to be true, of my own knowledge. I am competent to testify to such facts, and I would so testify if I appeared in court as a witness at the trial of these matters.

WILLIS A. CARTO
Date: October 9, 1982

District of Columbia, ss:

I, Lois Petersen, a notary public for the District of Columbia, do hereby certify that Willis A. Carto personally appeared before me in said District, the said Willis A. Carto being personally well known to me as the person whose name is subscribed to the attached Affidavit, and swore and subscribed to the same before me.

Given under my hand and seal this 9th day of October, 1982.

My Commission expires January

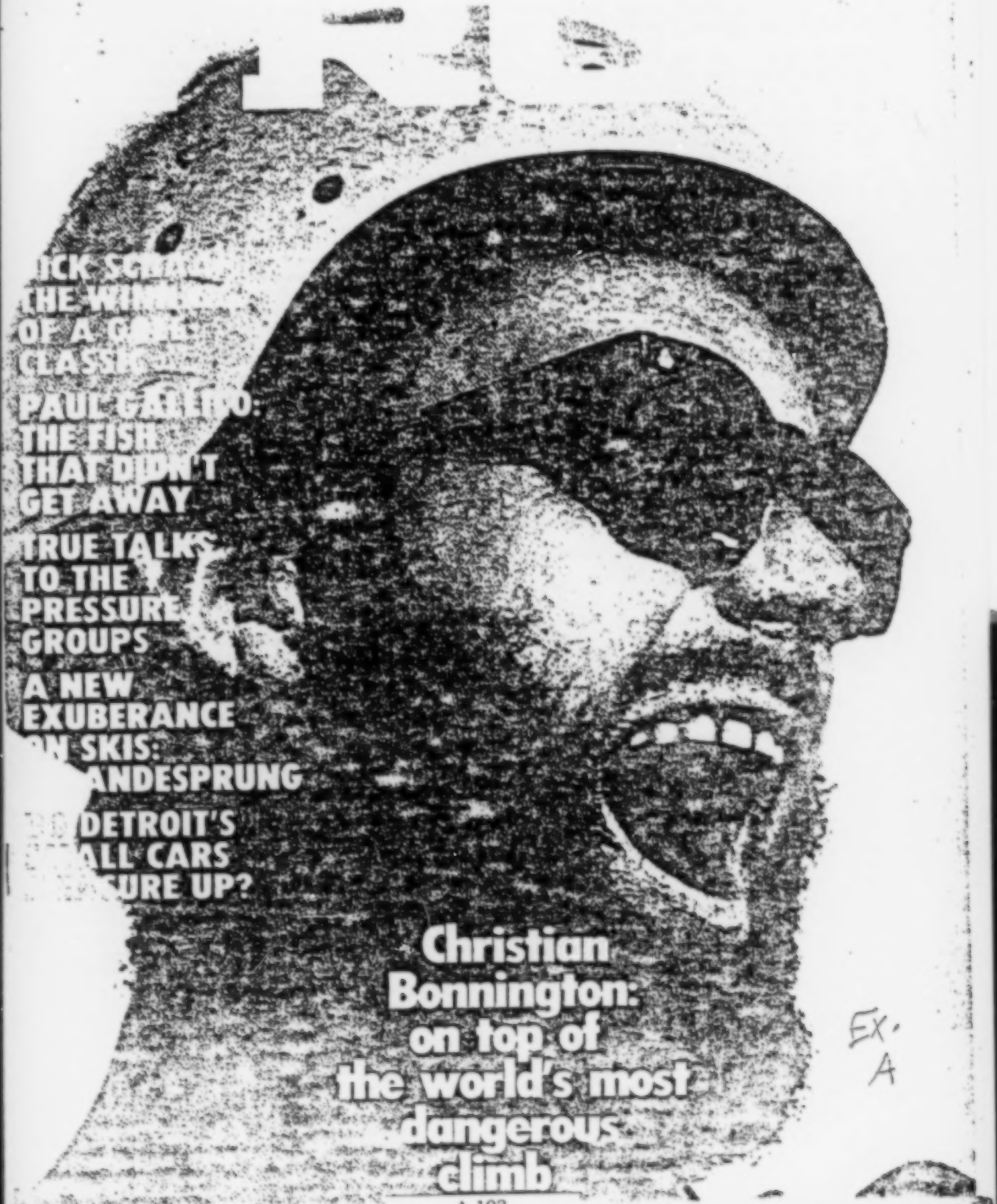
LOIS PETERSEN

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FOR TODAY'S MAN

A FAWCETT PUBLICATION NOVEMBER 1970 60c



EX. A

TRUE TALKS TO:

"THE PEOPLE'S LOBBY"

This interview is the first in a series with various sorts of pressure groups operating in the country today. Its business is not to make value judgments but to permit the reader to draw his own conclusions. We begin with Liberty Lobby, which claims a subscriber strength of more than 250,000 people. The interview took place at the Lobby's national headquarters at 300 Independence Avenue in Washington, D.C., an austere Victorian three-story brick and stone building two blocks from the House Office Building. Interviewed were Liberty Lobby board chairman Col. Curtis B. Dall and general counsel Warren S. Richardson. Dall is 73, tall, bald, disarmingly friendly and bluntly outspoken. He was born in New York City, attended Princeton University, was commissioned an ensign in naval aviation during W.W.I and retired a colonel after serving in the Army Air Force during W.W.II. In 1926 he married Anna Roosevelt, only daughter of Franklin Delano Roosevelt; they were divorced in 1933. He is the author of the book FDR: My Exploited Father-in-law. *Richardson, 46, received his law degree in 1954 from Catholic University in Washington, D.C. He was born in Rochester, New York, was discharged a lieutenant junior grade after three years as a naval aviator during W.W.II and is chairman of the Boy Scout Troop Committee in Derwood, Maryland.*

TRUE: Every lobby wants something. What does Liberty Lobby want?

DALL: Liberty Lobby was envisioned around 1955 by Willis A. Carto, a great American patriot who is our able Liberty Lobby treasurer. He felt the American people needed a lobby to compete with all the special-interest lobbies. We lobby for bills that we feel are good for the American people as a whole; we lobby against bills we feel are not good for the American people as a whole. We are the people's lobby! There's no other organization like ours on Capitol Hill, and some of the most antagonistic opposition has described us as being the most effective lobby in Washington. I refer, in particular, to the late Walter Reuther. I regard that as a great compliment.

TRUE: It takes a lot of money to lobby in Washington. Where do you get it?

DALL: Liberty Lobby is supported entirely by voluntary contributions from modestly situated Americans all across the country. We have no large financial angels whatsoever, in spite of some contrary insinuations by others. We're a nonpartisan group doing a productive and constructive service for the American people. We oppose the efforts of others who seek to downgrade this country, especially those who prefer a foreign type of government to our own.

TRUE: What are the wrongs in the country today that you feel you have to correct?

DALL: You have the cart before the horse. We don't originate causes. When a specific bill is considered in Congress, we look over that specific bill; we consult with counsel about it; and we decide whether or not we can add or subtract worthwhile changes in the structure of the bill. There are many things wrong with the American people today, but there are a great many things that are right! We have people in this country who want to change our form of government, who want to raise our taxes, who want to continue our expensive monetary system. When we find the reflection of those ideas in a specific bill, we try to change it or stop it.

TRUE: What is your organization's view on income taxes?

RICHARDSON: We have developed a program we call our Tax Equity plan. Briefly, it would place a tax burden on all income-producing, tax-exempt organizations—foundations, churches and the like—and it would plug up the loopholes for those multimillionaires who pay practically no taxes. There were many articles in the news last year reporting how large income-earners pay merely nominal taxes. If our plan of Tax Equity were enacted by Congress, the individual exemption could be raised to $8000 per person, and up to $15,000 per family. The worker would get the benefit.

DALL: We've published a book and a tabloid called *The Great Tax Fraud*, which details this. It was written for us by the distinguished expert on tax matters, Dr. Martin A. Larson.

TRUE: What has been Congress' reaction?

DALL: For the first time in many years, 1969 saw Congress pass a tax reform bill. However inadequate and faulty that bill is, it reflects in part our principles of Tax Equity. We will continue to press Congress for full implementation of Tax Equity.

TRUE: What is your stand on the move to impeach Justice William Douglas?

DALL: We feel that Justice Douglas, in several areas, does not measure up to the standards of a justice of the Supreme Court. Mr. Douglas has behaved in a manner that should cause him to be impeached, and a more capable, more patriotic and more representative American should take his place on the bench.

TRUE: What was your position on the nominations of Haynsworth and Carswell?

RICHARDSON: I'll answer that. Liberty Lobby had no official position on those nominations. We supported both men, unofficially, but we did not have a vote of our policy board members on the matter.

TRUE: Why do you think they were defeated?

RICHARDSON: Just two days ago I was in the offices of the Senate Judiciary Committee, talking with a member of the staff. We asked him point-blank what had happened on those two nominations. He said, "It was nothing but politics. Haynsworth and Carswell had nothing in their records." This man has been a member of that committee's staff for 20 years. He has access to both the secret and public files.

TRUE: Colonel Dall, as a recent visitor to Rhodesia you've been critical of President Nixon's decision to close the U.S. consul there and to institute trade barriers in protest to the racial situation. You've said that this is "an embargo against the policies of Rhodesia."

DALL: Yes, and the American people are aware of it. The alleged reason the United States and Great Britain stupidly put sanctions on Rhodesia, at the behest of the United Nations, are reasons not too difficult for a knowledgeable person to follow. The racial situation had very little to do with the problems in Rhodesia. Actually, the communist nations who have been playing up to the black man have come

up with a lot of misstatements about Rhodesia. The black man is being very fairly treated in Rhodesia. They have about 250,000 white people in Rhodesia and about four million blacks. There is law and order there. Very much more law and order there than in Washington, D.C. The real reason for the sanctions, in my opinion, is not racial at all. It's money. Control of Rhodesia's money.

TRUE: Do you feel that support for Vice-President Agnew and the recent defeat of the Labor Party in England indicates a worldwide trend toward conservatism?

DALL: There's a very definite trend toward what might be loosely termed conservatism in government around the world. I think the people of Great Britain had a craw full of Harold Wilson and his socialist-communist government there. I think the British businessman, small and large, and the British housewife have had it up to their chins and have said: "We don't want anymore of this Labor government. We want a government with a little common sense."

TRUE: Many people believe socialistic trends started in the United States when Franklin Roosevelt was elected to office in 1932. We find your intimate association with Roosevelt, as his former son-in-law, rather interesting. Did you agree with him?

DALL: I certainly did not agree with his political views, but I was very fond of him as an individual and he was fond of me. I would say that many of his policies, uh—he didn't dream up himself. It was as if he were the gun and the "ammunition" was supplied by an international socialist group. The American people are paying through the nose for many of those policies today.

TRUE: What is Liberty Lobby's stand on replacing the Electoral College with the direct vote?

RICHARDSON: Our policy board, having some 20,000 to 25,000 members, has voted on that issue. We are opposed to the direct vote. And we are opposed to the elimination of the Electoral College. We favor a change in the system, but we favor the Mundt plan. It provides for the election of the electors from the existing congressional districts. Electors are now elected by the entire state and the Presidential candidate getting the majority of the vote in each state gets all of that state's electoral votes. Until such time as the proponents of change come up with a better solution than the founders of the Constitution had, we feel constrained to go along with Thomas Jefferson and George Washington and Benjamin Franklin and the other creators of our entire system.

TRUE: How far to the right is Liberty Lobby?

DALL: Most of us are what you might call conservative, but I use that word cautiously; it's a hackneyed term. I would rather describe Liberty Lobby and myself as *confrontists*. We face the situations as they are. I don't like the temporizing that makes our national debt seem less dangerous than it is. I don't like euphemisms which compare our debt favorably with a year ago, or some other opportunistic comparison. I'd like to see our debt reduced. I'd like to confront those in authority in order to improve our monetary situation. I'd like to confront the people who are selling us this bill of goods on so-called racial "equality." That comes from those who advocate one-world government. There are two branches of the one-world ideology. There's the Fabian socialist philosophy that comes down from the top, and the communist philosophy that comes up from the bottom, which really isn't a proletarian movement at all, though the communists try to sell communism as coming from the bottom. Both are financed by the same one-world large-monied group.

TRUE: What do you mean by "one-world large-monied groups"?

DALL: Who do you suppose financed the United Nations?

TRUE: The United States?

DALL: You're talking about something which happened after the formation of the United Nations. Who put up the promotion money to organize the United Nations?

TRUE: We give up.

DALL: Who put up the money to finance communism in 1917? Or before that, who put up the money to get Karl Marx writing his little book? It came from the same source—call it a one-world money trust. It's money that finances the one-world program. Both sides. The fascist and communist movements. This trust controls almost all the monies of Western civilizations today! That's why I'm a confrontist. I'd like to help improve that, but I must confront them to do so.

TRUE: Can you name this—?

DALL: Oh, certainly. It's the Rothschild complex and their associates.

TRUE: They're bankers. One thinks of bankers as being interested in making money.

DALL: There are bankers and there are bankers. Some are interested only in money. Others are interested in both power and money. Our Western financial program has been largely formulated since, oh, 1776, by a small group of people in Europe. About that time the Illuminati was set up by Adam Weishaupt with bankers' help. Perhaps originally it was merely an ideological organization, but it soon developed into the financing of wars and revolutions. It planned and financed the French Revolution, which became a format for the revolutionary techniques and problems that we face today. In 1884 the Fabian socialist organization made its appearance in England. In 1897 Theodor Herzl started what is called Zionism, dedicated to colonizing Jews in Palestine aiming for political and financial world domination. These two different philosophies converged on us, a new little country, but very rich in resources with a very productive people. Soon this powerful group of top-level bankers began taking over our country. They have controlled England since 1694 when the Bank of England was formed—a privately owned and controlled bank. Just like our own Federal Reserve System is a privately owned or controlled system, no matter what you may read to the contrary. The central banks of France, Italy, Germany and other countries are privately owned. There are about 25 bankers on the top. The next lower level does the talking to the members of Parliament and our Cabinet officials here in Washington. There are several lower levels—the many fine citizens who run some of our local banks: the bank around the corner, the community bank. But the control comes from the top. Those very nice neighbors—friends of yours—that run a bank in Springfield or in Rockville, you name it, they must follow the power edicts from the top level, or they'll be out of a job in 30 days. When you control the economy of nations you must protect that control. The media of communications are controlled by them. Otherwise, if the truth got out as to how they are making the vast sums, on the various peoples of the world, the game would be up. When the United Nations was founded there

[*Continued*]

was a big cost for promotion, for promoting the one-world idea. That big cost came from the top holders of very large monies. These world movements have to be financed. For example, I think it's well known that Jacob Schiff gave $17 million or more to start communism, and sent numerous communists over to Russia. I think his grandson made that public statement. That's pretty well known. The $17 million was a pretty good deal. It got the little movement off the ground, as it were. They succeeded.

TRUE: Why would a capitalist give $17 million to promote communism?

DALL: They—the international bankers—want *all* the main natural resources and markets of the world! They want *all* the money of the world, the gold, the silver. They want control of the world through a one-world government. When they begin to get that, at that time, the money boys and the ideological boys will be allegedly fighting it out. There won't be much of a world left. You see, they want it all. I raise my eyebrows when the Chase Bank wants to get more footsy-footsy with the Soviets. Some bankers, apparently, have got to do business irrespective of the best interests of the people. They want big business over in Soviet Russia, yet the communists are killing our boys in Viet Nam. Now we've got to cut out that kind of nonsense. We've either got a government here or we haven't.

TRUE: You're saying there's a conspiracy of international bankers?

DALL: That word "conspiracy" has been overused. Let's say there's a world plan to get control of all the world's governments and thus to control the world's currency and the world's raw material markets. There certainly is no doubt about this! The people who put up the money for the United Nations wanted concentrated control. So far as the United Nations standing for peace and this or that idealistic plan—all that is absolute nonsense. The United Nations is as phony as a three dollar bill. It is simply a device, a deceitful device. It is a device from a war-mongering group to entice us into a one-world government and then one-world banking control. The idea is a concealed operation so that you and others don't know what is going on until you are firmly trapped.

TRUE: This notion of yours doesn't take into account the vast power and interests of giant corporations like General Motors or Ford. The Ford Company, for example, puts great sums into the Ford Foundation, an organization that promotes good works and—

DALL: Who led you to believe the Ford Foundation is an implementer of good works?

TRUE: We—

DALL: What is your definition of good works? Good for whom? For the Soviets?

TRUE: Philanthropy, we suppose, and—

DALL: I now want to comment on the Ford Foundation you mentioned, because it is proof of the deceit involved in the opinion-making devices referred to previously. I can conceive of no large group that does a more unenviable and unpatriotic job on the American people than the Ford Foundation. A personal friend of mine was told by the head of the Ford Foundation in 1953, quote, The policy of the Ford Foundation is to so alter life in the United States that we can be comfortably merged with the Soviet Union, unquote. Their overall policy hasn't changed since then. Think of it! I would like to see Congress usher in a full-fledged investigation of the Ford Foundation.

TRUE: Do you favor a guaranteed annual wage?

DALL: We are opposed to a guaranteed annual income. We are against it in principle. We are against it because we cannot afford it. It is not sound economics.

TRUE: How do you regard George Wallace?

DALL: Is there a George Wallace bill coming through Congress?

TRUE: Do you automatically turn down liberal legislation, no matter what it is?

DALL: I don't think we are that mentally inflexible. It is true that our supporting efforts are preponderantly for conservative programs. However, we always keep our minds open.

TRUE: Liberty Lobby, you told us before this interview began, has opposed Viet Nam from the start. Why?

DALL: Our position on Viet Nam is basically that enunciated by George Washington. He said in effect, we really ought to mind our own business—stay aloof from entangling alliances!

TRUE: How would you resolve our involvement in Viet Nam right now?

DALL: We have proposed the formation of an All-Asian Anti-Communist Foreign Legion and are glad to see that this recommendation has been acted upon in part by the President.

TRUE: Do you support the House Internal Security Subcommittee?

DALL: The one-world plans of the international bankers are inimical to sound American interests. Anything we can do to protect our American interests ought to be maintained and safeguarded.

RICHARDSON: The challenge we face today is the threat of worldwide communism. Whether communism is a part of the international money order or not isn't too material to your specific question. The point is, we must protect ourselves against what is obviously the source of attack. When you know you have an adversary, the thing to do is protect yourself from this adversary. The House Internal Security Subcommittee exposes communist activities for the benefit of the American people.

TRUE: We're confused. Who's the enemy? The bankers or the communists? We detect an ambiguity.

DALL: There's no ambiguity. The enemy is the financial one-world plan to destroy us, regardless of the means. Downgrading our monetary system is their number one effort. Number two, all of our churches have been harmed and their spiritual message diluted by apostasy. Three, education has been made a shambles in this country. Art is being debauched. Music is worse. Campus unrest is just a facet of the penetration of the financial enemy's agents into the various colleges. It all comes from the same source.

RICHARDSON: It's a technique. The communists feed input into the colleges about ecology and future horrors which have built-in frustration because the solutions are unrealistic, impossible or uneconomic. Thus they're conceived to assure failure: confrontation with an Establishment unable to react other than to refuse the impossible and impractical, thus resulting in violence.

TRUE: Do you believe a cause of campus rioting is the infiltration of student groups by troublemakers?

DALL: I know about only one college in particular. That's Princeton University. There are very few students who are really responsible for the so-called disorders. A minute percentage. There are professional troublemakers who are there to foment trouble and to cause dislocations, but they come from the outside and the question I always ask myself is: "From what source do they get all this money?" My guess is that a lot of this money comes from the large foundations such as the Ford Foundation.

TRUE: What is your ideal of a federal government?

DALL: The least government is the best government. This is not a bill, but my personal feeling is that we have wandered far from our American ideal of government. We have too much concentration. And we have been duly led

there by people who want to destroy our type of government.

RICHARDSON: That's the only way they can do it.

TRUE: Why is Liberty Lobby against busing schoolchildren to achieve racial balance?

DALL: I am told that busing is illegal, that Congress specifically prohibited busing for integration purposes in the public law facilitating integration.

RICHARDSON: It goes beyond that. Our Constitution—especially the first 10 amendments, the Bill of Rights—could be summarized in a succinct manner: Americans are against force or compulsion. Busing of students requires compulsion, compelling some to move away, compelling those who stay to accept. Liberty Lobby believes that the traditional American concept of freedom of choice must not be denied *any* group.

TRUE: A Liberty Lobby pamphlet says, "Forced integration has resulted in a sharp rise in interracial dating. The great majority of interracial dating involves black males dating white females." Do you see this as a real problem?

DALL: No, I don't see it as a problem. I think it is a part of a program of international one-world forces to downgrade our society as a whole. And I think most . . . most responsible colored people feel the same way. I think it's just a facet of the one-world plan, an attempt by the people who are trying to tear us down to mongrelize our society.

TRUE: Why do you oppose sex education in the schools?

RICHARDSON: Liberty Lobby does not oppose the concept of better education regarding sex. We do not object to the idea of the pure knowledge involved. Nobody objects to teaching the academic subject. Liberty Lobby does oppose the teaching of sex education in the schools, however, for several very valid reasons. First of all, the school is not the proper setting for learning about sex. Secondly, the schools are not permitted, at least at this time, to teach moral or religious principles in connection with sex. Third, much—not all—but much of the sex education in the public schools is not just secular and amoral; it is designed, openly and unashamedly, to destroy all of our classic mores and moral values.

TRUE: Liberty Lobby opposes labor unions, but it is said that it is the rank and file of the unions who comprise a strong segment of the politically conservative. Don't you find a conflict here?

RICHARDSON: There is a distinct difference between the labor union leaders—the professionals, including the business agents—and the members of the labor unions. The members do not agree with the philosophies of the professionals. But the aggressive tactics of the professionals in getting benefits for the members, who don't want to be involved in controversial issues, perpetuates professionals in their jobs.

DALL: Yes. Here's a case in point. You've got to remember that the labor unions were very weak for a long time. They had no assets, no income. They had difficulty getting members and collecting dues. Someone had to put up the money to establish them before they had any money of their own. All I can say is that the labor-union plan was a well-thought-out and clever device for controlling wages. Control of still another part of our society.

TRUE: Liberty Lobby is opposed to tax-supported housing. Who will underwrite low-cost housing if the government doesn't?

RICHARDSON: What's wrong with free enterprise? Why do we feel that the government has all the answers? We regulate, repress and smother dynamic free enterprise which has done so much for this country, but with proper treatment free enterprise will do it again. A $30,000 house could be built for $20,000 or less if the private builder had the same tax breaks as the government project.

TRUE: In your literature you say there are 750 security risks working in the State Department. Who are they?

RICHARDSON: That was some time ago, but it is likely there are more now, not less. The famous case of Otto Otepka revealed this. Mr. Otepka was the clearance officer for the State Department in 1961 during the Kennedy Administration. He was told that he had to pass certain individuals who were not eligible for clearance. He refused and was put in an obscure job as punishment. He was restored by President Nixon to the Subversive Activities Control Board. It was Otepka who said there are 750 security risks in the State Department as a result of the Administration passing individuals unacceptable during the time he was removed from the job.

TRUE: Your literature alludes to homosexuals being bad security risks. Can't a homosexual also be a loyal American?

RICHARDSON: Homosexuals have always been security risks because they are vulnerable and subject to blackmail. That has been confirmed time after time in recent history.

TRUE: The FBI is generally regarded as conservative, but in your literature you object to its method of investigation. Why?

RICHARDSON: We do not approve of invasion of privacy by the FBI or any branch of government, including Social Security, Internal Revenue, the Census Bureau or any other agency.

TRUE: J. Edgar Hoover has been quoted as saying that wire tapping can be an important tool. Does Liberty Lobby oppose wire tapping?

RICHARDSON: Liberty Lobby opposes all wire tapping. Even though recent changes permit use of wire taps with court orders, we feel the risk of the invasion of privacy of the ordinary citizen, with or without court orders, is too great.

TRUE: Your policies indicate a nostalgia for the simpler days of the 1930's. Are you trying to roll back time to the days of isolationism and a safe, front-porch America?

RICHARDSON: We believe it is the liberal who wants to turn back the clock. We witness the parallel between the degenerate fall of Rome and the excesses of a permissive America. We note that the youth are far more demanding in avoidance of foreign entanglements, even when our security is involved, than the most outspoken isolationist of the Midwest in the '30's. We most importantly notice a trend—a rush—toward dependence upon the government by the citizens, reminiscent of the feudalism and monarchies of the past. We simply want to protect and maintain the true values in America and in our society. And, we believe, if we do not, we will wake up one morning and find our freedom gone, regardless of cause.

TRUE: Colonel Dall, what do you personally get out of Liberty Lobby?

DALL: My satisfaction is in awakening the American people to what is going on in the country. I am out front, as chairman of the board, and I hear about it when anything goes wrong. I believe in our heritage. I have always believed it to be the finest heritage a man or woman could have—America! I respect what we have inherited from our forebears. I dislike and rebel at seeing our culture being deliberately distorted and destroyed by a group of very powerful people. I do not see anything substituted for our culture which is remotely as good as what we have now. We have talked about many facets of that penetration of our society in this talk. It is important that Americans be kept informed. To sum up, we want to resist the decline of constitutional freedom and the escalation of anarchy, through the legislative process.

In the District of Columbia

I do solemnly swear that the statements contained in the article by Joseph Trento and Joseph Spear, appearing in TRUE of October 1969, entitled NOW NAZI HUT POWER HAS INVADED CAPITOL HILL, is a complete fabricated and malicious LIE.

The aforementioned statement is as follows, and I quote:
"To achieve this, Carto devised a system for controlling congressmen. Mrs. Sarah Shields Jobe, 77, once a prominent southern attorney, describes the system, which she unwittingly helped construct: "Carto asked me to do some research on a number of congressmen. He asked me to find out what secret organizations they belonged to. He asked me to find out if they were members of the Ku Klux Klan or the White Citizens Council. He called the file 'Kosher Konservative Kongressmen'-or the KKK file. I guess he had 52 people in there. As time went on I learned that Carto was a Nazi and what he was using Liberty Lobby for. He was making a concerted effort to take over the conservative element of Congress via blackmail." " Like Jeremy Norns, Mrs. Jobe was a responsible conservative concerned that Liberty Lobby subscribers were being defrauded. She carted off Carto's files, which have been made available to TRUE. In addition to the eight senators and representatives who are identified as secret members of the Francis Parker Yockey Movement, more than 40 are listed as onetime members of the Ku Klux Klan or White Citizens Council. Since TRUE was unable to verify these alleged memberships, however, the names will be omitted."

Under oath, do I declare that Mr. Carto has never requested me, at any time whatsoever, to set up any file of whatsoever nature on any senator or congressman; nor is there a file of such nature, much less as that quoted in TRUE magazine, in Liberty Lobby that would cast aspersions on the honesty and intergrity of any member of Congress, nor give the membership of such in any of the above mentioned organizations.

Under oath, do I declare that I have never stolen, or taken, out any papers of any nature whatsoever from the files of Liberty Lobby, much less given them or sent them by any person whatsoever, to TRUE magazine as set forth by said Trento and Spear in the above quoted article. Nor have I ever had any correspondence with the said magazine and do declare that the statement is an unabridged LIE of the most detestable, malicious kind, and, what papers or records they may have, as set forth in the article, are either forgeries or else, stolen by some one else of which I have no knowledge, which I doubt seriously, for as I stated, was no such file to my knowledge. I wish to declare further, that the statement contained therein as to the charges, as so expressed by me, of Mr. Carto's Nazi affiliation and the establishment by him of Nazi organization, I have never found any foundation, I have never, at any time, heard him discuss such an audacious plan, of system as they call it, of his "taking over dictatorship of the government."

I am making these statements upon my own volition, requested by no one, and under the influence of no one whatsoever. I am not, and have never been in the employment of Liberty Lobby, or attached to any affiliation whatsoever, except in a temporary nature, in the setting up the files and library for Liberty Lobby some time ago and owe no obligation to anyone attached thereto.

Sworn to by the Said Sarah Shields Jobe and signed by her in my presence.

This day of October 17, 1969, District of Columbia.

Sarah Shields Jobe

Notary Public

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APPENDIX H
DEPOSITION OF WILLIAM C. McGAW

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC. and WILLIS A. CARTO,		
Plaintiffs,	)	Civil Action No.
v.	)	81-2240
JACK ANDERSON, et al.,	)	
Defendants.	)	

Washington, D.C.
Wednesday, October 7, 1981

Deposition of WILLIAM C. McGAW, a Defendant herein, called for examination by Counsel for Defendants in the above-entitled action, pursuant to notice of taking deposition, and having been duly sworn by PATRICIA A. FOYE, a Notary Public in and for the District of Columbia, in the offices of Liberty Lobby, Inc., 300 Independence Avenue, S.E., Washington, D.C., commencing at approximately 9:40 a.m. on Wednesday, October 7, 1981, and the proceedings being taken down by Stenotype by PATRICIA A. FOYE and transcribed by her.

APPEARANCES:

On behalf of Plaintiffs:

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On behalf of Defendant Armes:

R. CHARLES GENTRY, Esq.
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ALSO PRESENT: Ms. Brent Whitmor

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PROCEEDINGS

Whereupon, WILLIAM C. McGAW called as a witness by Counsel for Plaintiffs, and having been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. LEE:

Q. Please state your name.

A. William Cochran, C-o-c-h-r-a-n, McGaw, M-c-G-a-w.

Q. Mr. McGaw, we've already met, but for the record I'll state that my name is Fleming Lee and I am the attorney for the plaintiffs in this case, Liberty Lobby and Mr. Willis Carto.

I have spoken to your attorney who called me from El Paso, and he knows that this deposition is taking place today and it is taking place with his approval.

Mr. Armes, who is also a defendant and the only other defendant who, to my knowledge, has been served is going to be represented here within a few minutes by his attorney, Mr. Gentry.

Meanwhile, let me ask you a few background questions. Where were you born?

A. Kokomo, Indiana.

Q. What year?

A. May 14, 1914.

Q. Are you married?

A. Yes.

Q. Where do you presently reside?

A. At 138 Gibbs Street, G-i-b-b-s, El Paso, Texas 79907.

Q. Are you presently employed?

A. No.

Q. Why don't you give us your employment history then in reverse, starting with your most recent employment and then working back to your first significant employment.

A. Until about July 4 or 5, sometime in the early part of July, I was employed as editor of The Investigator Magazine.

Q. Excuse me. That was July 1981?

A. 1981. The corporate headquarters are in El Paso, Texas, 1717 Montana Avenue. And that is where I also did the editorial work that I did.

Q. And when did you start that job?

A. I began in mid-October 1980, about the 10th of October, until the early part of July 1981.

Q. What was your employment prior to that?

A. Prior to that and during that time I was editor and publisher of the El Paso Journal, a weekly newspaper in El Paso, Texas.

Before that I published The Southwesterner, a magazine in Arizona, West Texas, New Mexico. I wrote books and articles as a free-lance writer.

MR. LEE: Excuse me.

(Whereupon, brief recess is taken.)

(Whereupon, Mr. Gentry enters the deposition room.)

(Discussion off the record.)

BY MR. LEE:

Q. If you would like to continue, Mr. McGaw.

A. I've been self-employed for the last 20 or 25 years in one manner or another involved in writing or something of that nature.

Q. What about your education? Could you give us a very brief summary of that?

A. Yes. I was graduated from Shortridge (phonetic) High School in Indianapolis. I attended Indiana University for one year. I later attended Benjamin Harrison Law School for one year. And I studied microbial genetics at UCLA. And various other things. I have a degree in nothing, but I have studied a lot of different things.

Q. Have you been in the armed forces?

A. I was a ship's doctor in the United States Maritime Service during World War II.

Q. To get back to your employment or -- I don't know if you were self-employed or not, but your connection with The

Investigator magazine, an article in The Investigator of course is the subject of this lawsuit. Are you familiar with the article I'm referring to which was in the October 1981 issue of The Investigator?

A. Yes, I am.

Q. And the subject of that article was Mr. Willis Carto and Liberty Lobby, among other things; is that correct?

A. Yes.

Q. I see you seem to have a copy there before you.

A. Yes, I have a copy.

Q. Please give a history of the development of the publication of The Investigator magazine according to your own knowledge.

Q. As I stated earlier, as editor and publisher of the El Paso Journal I noted that progressively we were covering stories of national importance and international importance, and less about local happenings in El Paso because there as well as many other places what happened nationally and internationally has a lot more impact on smaller cities today than it ever did.

In that coverage I noticed that many areas were not being completely and properly covered by national media. I don't know yet what the reason for that is. But some of the stories that I don't think have been treated in any full sense in major publications -- for instance, the Trilateral Commission is one that we did a lot of work on, on laser and particle beam weaponry which we've known for about a year makes the MX missile system obsolete, and I still don't know why they are continuing to say they're going to put it here, there or the next place. So many national stories that by a vast knowledge and background that I have in various fields and that one of my editors had, it seemed that we were getting more information in a little town in West Texas than apparently was being covered in Washington, New York and places like that.

So I thought that we should for many reasons enlarge the scope of our work. And I hit upon the idea of having a magazine that would take -- we would review information from several sources, reduce it to terms that the average person could understand, and then investigate the gap in the information to try to

put a situation into a context and words that an ordinary person can see what is going on.

Some people have called this the information society that we're in presently, and for the want of a better term I'll accept that. But the situation that is developing is this.

If you're an expert in any particular field, brain surgery, hematology, law, anything, laser weapons, if you were to start reading immediately and spend the rest of your life reading, you could never cover all that's written in the field in which you're an expert, no matter who you are. This is a rather alarming situation. And as I saw it it's one that could easily overwhelm an ordinary individual in this country.

At some point a magazine of this nature still has to be launched to be able to condense and to put into context and to translate into terms that an individual will know how an event affects them personally. And it takes a very large staff.

Q. Was The Investigator magazine the product of your own idea then?

A. That was what I wanted to do. This is the idea I had to get it started.

In El Paso there's a private investigator by the name of Jay J. Armes who is recognized throughout the world as one of the top people. And I've known Armes, not intimately but of Armes for the last 10 or 12, 13 years, and we've met occasionally.

And while we were working on the same particular story about last May or June or sometime along in there, I discussed the possibility --

Q. Excuse me. When you say last May or June, you mean 1980?

A. -- 1980; excuse me -- about the possibility of such a magazine. And he was interested and said that he would like to talk to Bill Adkins with the West Texas News Company, who is managing that, and see what he thought of it. And I had explained to him that I had already talked to Adkins briefly about that company distributing the magazine on a limited basis in Texas, Arizona and New Mexico perhaps for a test, and that I had discussed it to that extent with Adkins.

Q. Did you envision it to be a national magazine?

A. I did, but only -- my idea initially was to have an edition of about 20,000 to 30,000 copies, and then see how it did there and to work into it gradually. Because the amount of research and the length of time for the preparation of the articles in some of these things is very long and very expensive. And I felt by going in gradually, you'd be in a much better position.

The result of Adkins' talk and Jay's talk was that Adkins not only thought it was a good idea, but wanted to participate in it. And Jay asked me if I thought that was proper. And anyone that knows the magazine business certainly isn't going to hurt anything, and we agreed to that.

Up to this point it was conversation on what might happen.

About then I came to New York to see who was available for positions there. And I arranged tentatively for an ad representative and for an art director and also for a couple of writers to work on staff work.

Then I came to Washington in search of people who might be interested in writing for us and who would free-lance for us, and I talked to several people. I came here to the Liberty Lobby to see if there was -- to see if George Nicholas was here. I'd been interested in stories he was doing on Warner Cablevision and their perceived association with organized crime.

And one of the people I wanted to talk to was Jack Anderson, and I spoke with him at his office on 16th Street about doing a monthly article that would be exclusive and not a rehash of his columns, something of that nature. And he told me that he had been interested in organizing a magazine but hadn't yet gotten around to it and that he would be interested in participating even more in this project than we had discussed. And I could see that that could have a lot of benefit to us; he has a national reputation.

He said that his terms would be that he would like a 25-percent interest in the publication and that he wanted the right to veto any story that we might have under consideration, and that he would provide his staff to check out all of our stores for accuracy and to perform such editorial duties as that, in lieu of investing cash in the publication.

I went back to El Paso and discussed this with Adkins and Armes, and it was eventually agreed that we would offer him 20 percent of the stock and five percent of the net profit after specified deductions rather -- the reason it was done that way is we didn't have 25 percent of the stock left. It had already been -- we had only 20 percent left. So we put five percent of the net on top of that instead of the total amount in stock.

Q. Excuse me. Could I interrupt just to ask you when was the corporation formed?

A. October 1, 1980. And this was in September.

Q. In other words, you were incorporated in October, the 1st of October 1980.

A. Approximately the 1st of October.

Q. And what was in September?

A. This was in September; the meeting I had with him was about September 10, 11.

Q. The meeting with Anderson.

A. With Anderson.

Then I called, I telephoned him -- I went back and they agreed or they suggested this arrangement. I telephoned him and he accepted those terms, and within a week he was in El Paso, and we had a meeting at which time this was agreed by all the parties.

Then the corporation was actually formed. It had been in the formative stages up until then. And that was when the corporation was formed. And, as I understood it, Anderson's position was that he could veto any article under consideration. And I agreed to this, although I was editor, because I could understand that a person with a national following could have conceivably some very sound objection to why an article should be published with his name as publisher. But I didn't anticipate that it would be used -- the veto right would be used to the extent that it eventually was. I was to learn that if you give a veto right to anybody on a magazine, you've turned over editorial control in effect.

Q. Did anybody else have veto power?

A. No. But in a sense -- not in a written agreement, but in a sense the editor does. That's a part of his obligation. It isn't

written, but I assumed that I would have the right to veto any article that I didn't want in also.

Q. Just to fill in the background, what was the exact name of the corporation that was formed at that time?

A. The Investigator Publishing Company, a Texas incorporation.

Q. Where was it incorporated?

A. In Texas, and 1717 Montana Avenue are the corporte headquarters.

Q. Who were the incorporators? Who signed the document?

A. I believe it was the three of us, Adkins, Armes and myself.

A. I didn't quite understand whether this was done before Jack Anderson came along or --

A. It was discussed before, but it was actually done afterwards, after that agreement.

Q. Excuse me. I hate to say this, but you're tending to run over my questions a little, and the reporter can't get the question down before you answer. So if you could just pause a moment.

And I didn't hear the answer. Would you read it back?

(Whereupon, the reporter reads from the record.)

BY MR. LEE:

Q. Was the corporation formed in the sense that a certificate of incorporation was issued, or however it's done in Texas, before Jack Anderson came to Texas for the meeting at which time you said that the corporation was formed with Anderson?

A. It was done afterwards. He came to Texas first, and then the corporation was formed at a later date.

Q. Did Mr. Anderson sign any document at all in the process?

A. There was an agreement drawn up between the corporation attorney, William Elias, and Anderson's attorney as to his position, his ownership and his editorial prerogatives.

I'd like to add here that that agreement was contrary to what I had understood, and I didn't know the full details of it

until August the 4th, 1981, that it was actually written that Anderson had total and complete editorial authority.

Q. Who on the part of the corporation signed the agreement with Anderson?

A. Well, in effect it would have been Elias who drew it up. And the way corporate papers are signed, when the attorney gives them -- I can't remember. I might have signed it myself and the others because of the nature of doing that.

Q. Was there a board of directors?

A. Yes.

Q. Who was that?

A. The board of directors initially -- well, the board of directors were the stockholders, Adkins, Anderson, Armes and myself.

Q. And who were the officers of the corporation?

A. The officers were Adkins was the President and the Chief Executive Officer. He asked for that title because he was going to have to negotiate arrangements with magazine distributors, and he said that with such a title he would be able to negotiate better than if he were something less than that. And so we agreed.

And Jay Armes was the Vice President, and I was Secretary. And Adkins was President and also Treasurer.

Q. And as far as the personnel of the publication itself, The Investigator magazine, were concerned, is the list on the masthead of The Investigator an accurate list so I don't need to run through that?

A. I notice it changes almost with every issue.

Q. That's right. We're both looking at the issue of October 1981, aren't we?

A. I've got September.

Q. Go ahead with September if you'd like, because that was the first issue.

A. The first issue is the only one that I had any editorial control at all, and not a lot of that.

Q. Don't let me forget to come back to the rest of that store, but meanwhile just run down the list of names.

A. In that publication it is Publisher, Jack Anderson; Chief

Investigator, Jay J. Armes; Chief Executive Officer, Bill Adkins; Editor, William C. McGaw; Managing Editors, Charles Berg (El Paso), Opal Ginn (Washington) --

Q. Can I interrupt just a minute? On the second issue, the one of October '81, Mr. Adkins' name does not appear in that position on the page. Do you know why he would have been omitted?

A. Well, Adkins himself was in charge of the make-up, and he and Anderson were in editorial charge of the second one. Now, I notice what has been added at the bottom of the masthead on page 6 is this statement --

Q. Which issue is this?

A. This is the second issue dated October 1981, is the statement that didn't appear in the first one, and it is this: "The Investigator is published by The Investigator Publishing Company, Bill E. Adkins, President and Chief Executive Officer."

Now, you'll notice in the first one that one isn't above that. And this was a subtle shift of authority. I don't know how subtle, but Armes and I had virtually nothing to do with the make-up or the selection of stories in The Investigator.

I worked with Tom Whittle on the Victorial Peak (phonetic) story, and that was my input as far as --

Q. Well, maybe we should go back to where you left off a minute ago. You were describing about the corporation being formed, and I interrupted you to ask about the technicalities of that.

The only other question I have on that, by the way, is the question of financing, who put up what money.

A. When we discussed financing, I was in favor of selling preferred stock, because I haven't a great amount of capital and I thought that would be the proper way to go about it.

Adkins advocated that we do the whole financing by bank loans. Well, that was fine with me. At that time bank loans were down to around -- 10 percent was prime then. It had gone from way up in October and September. And so I said that would be -- I mean if it would work, fine. I said, "Look, that's up to you. You're the Executive Officer, so do it however you think it best."

All three of us signed notes at the ABC Bank in El Paso, Texas.

Adkins had suggested that the magazine distributors for a magazine of this nature would quite likely provide virtually all of the money for the actual publishing and distribution, the printing and all of that. And this surprised me. I didn't know that was a possibility. And all we would have to finance was the editorial work.

That seemed feasible to me, and that's the way the magazine was financed until about April 1, 1981. We had a $50,000 line of credit at the ABC Bank.

I was the only one working full time at that time, and I was working without salary, although it was contracted that I was to receive $50,000 a year at some point, whenever the magazine could afford it. And I worked without recompense.

Q. Was anybody being paid a salary?

A. No.

Q. Has anybody been paid a salary by the magazine?

A. Yes.

Q. Have you ever been paid anything by the magazine?

A. Yes, and that's a complicated story.

Initially I had 30 percent of the stock, Adkins had 30 percent, Armes had 20 percent and Anderson had 20 percent of the stock. That was agreed upon because initially Adkins had agreed to start working full time October 1, as I did, and that we because we were devoting our full time to the project should receive more stock than Armes or Anderson because they had other businesses operating at the same time.

This arrangement went on until about January when I worked up a mock-up of the initial magazine with three copies, and one of them Adkins took to New York and showed to four distributors, and more or less they were bidding for distribution rights. And the International Circulation Distributors, ICD as it's known, a Hearst corporation, agreed to provide all of the up-front printing costs which amounted to about $94,000 and the distribution and so forth.

And even at that time I was more in favor of making a stock corporation out of it, I mean for the financing. And Adkins called

from New York and said that they would do this, and I frankly was surprised and said, "Well, if that's the way it is, that's the way it is."

So then he went to Washington and he met with Anderson for the first time. And this is when they started to change.

It was agreed between him and Anderson that Anderson would be given an amount of money to maintain a special staff here and to buy articles. This was never agreed as far as I was concerned; I had never understood this.

Q. What was the approximate date of that meeting?

A. It was in the first week of January, and he was here I'd say sometime between the 4th and the 8th of January.

Q. Adkins?

A. Adkins.

When he returned to El Paso and said that he had agreed with Anderson to provide initially $10,000 for him to pay for articles and a staff and that this would subsequently be advanced, I explained that we'd had no staff in El Paso and that this was going to take virtually all the money that we had. I had a former managing editor of my weekly paper, Charles Berg, working with us, and that was the staff. And with this money going to Washington, I wasn't going to be able to do it.

Well, it never really -- that was never approved by the board of directors, because I would -- well, it was just done. Adkins had the authority as Treasurer and President, and he just transferred the money. From then on the control went -- well, eventually totally to Washington. And the people who worked with him were being paid, some eight or nine or 10 people were put on the payroll. And we had none in our office except Berg, and at that time I wasn't receiving anything either.

Q. Do you know who those people were, or some of them, who were on the payroll?

A. Yes. I had a list, because I made an issue of it after it became pretty -- I mean this was a divergence from our regular plan, so I asked Adkins to give me a list and how much each person got.

Q. Can you just supply me with a list later?

A. Yes, I'll supply that later. But the people -- for in-

stance, when I went back in November -- no, in February after they had met, I found out that Opal Ginn was a managing editor. Well, she's Anderson's executive secretary, and her editorial expertise is nothing.

Q. Wasn't she also Drew Pearson's secretary?

A. I don't believe so. But she has absolute control over that office, but her editorial knowledge is a mystery to me. But she was editor.

And then Joseph C. Spear, Charles Bermant is on there as editor. Now, this is the second issue. In the first one Charles Bermant, Joseph C. Spear; then there's Badhwar as a contributing editor, Ron Laytner, Jack Mitchell, Howard L. Rosenberg, John Ullman and Dion O'Wyatt. Now, apparently Badhwar, Mitchell, Rosenberg are in his office, I would assume, because I don't even know who they are. I've never seen them. And Bernie Springsteel who is the art director, I employed him myself. He is in New York, a very capable guy, and I was the one who originally employed him.

Q. Why did you employ an art director in New York?

A. That's where you have to work from. The photographs, the services and so forth for a national magazine, you couldn't even really do it in Washington. That's where the headquarters for all the news services and everything are.

Q. What was Mr. Springsteel's background and what was his responsibility?

A. he had been with Hearst magazines for about 20 or 25 years, and had a vast experience in laying them out and obtaining this, and is a very capable man.

Q. Did his responsibility include choosing the art work choosing the artists, deciding which--

A. In effect, that's what--

Q. --illustrations would appear in the magazine?

A. When I worked with him we did that together. I would suggest that we needed something and he would try to find it. And he's very good.

Q. Maybe we should get on to the real point of this which is the -- as far as my interest is concerned, which is the article about Mr. Carto which appeared in the second issue.

And as we talk about that, it will give you an opportunity to fill in the method by which the magazine was put together and who had the responsibility. So please feel free to talk about the comparison between the way you handled the first issue and the way you handled the second issue.

A. All right.

Q. As far as this particular article is concerned, which is entitled America's Neo-Nazi Underground, and includes under that heading two articles, one called Yockey: Profile of an American Hitler, by John C. Obert, and the other article, The Private World of Willis Carto, by Charles Bermant.

Incidentally, I just noticed when I looked at the cover it's dated October '81, and the little line at the bottom of page 21 says The Investigator, September 1981. Apparently they had some confusion over how the particular issue was to be dated.

A. No. That would be a typographical error. They had some of the -- those are all set up ahead of time; there's a whole set of them. And then you make a new set for these. Now, if it was September all the way through, I'd say it -- but you'll notice on page 13 it's October, and then it goes to page 20 it's September, and then you get back to the other pages it's October again. That only occurs on a couple or three pages. For instance, even on that story the first page says September, but on page 22 it says October. It's a typographical error would be my conclusion.

Q When did the first issue of the magazine appear in actual fact?

A. It went on the newsstands on July 7, dated September.

Q. And did you immediately begin working on the second issue after that, or had you already begun planning the second issue?

A. We had already begun to an extent. The first issue of The Investigator magazine was put together in its final form in New York from about May 10 to 15 while I was there.

There was a great amount of articles that Anderson wanted completely killed. For instance, Hank Messick's article. Even Proxmire's column, after arranging for it I had a difficult time keeping that in. And he wanted three complete investigator profiles, which would have been much too much. The Unsolved

Mystery, The Daily Double, he didn't want in. Is There Really a Cure for Cancer, we had to force that one because he didn't like . . . somebody. And Rocky Beginnings of the IRE he said was an in-house type of thing. I said, "My goodness, the investigative reporters and editors who were working with it, this is the biggest story they've had." And according to what I read in Spotlight, his position was against the Boll's position at the beginning. Maybe that had something to do with it; I don't know.

Then Cocaine Cowboys, really he was against Messick's article from the beginning. And when I finally got what I got in, it was gutted. And it was a very important article on the cocaine business in Miami and what it was doing.

Q. What kind of reasons did he give for objecting to all those articles?

A. He usually had two or three. He'd give you one at a time.

The one on Cocaine Cowboys and the crime it was causing in Miami, he said, "Oh, that's only a local story." I said, "Well, Jack, every story is a local story." For instance, if Sadat gets shot, he gets shot in Egypt. You know, there is no such -- wherever an event occurs, it occurs in a locality.

Then I talked to Messick, and Messick said he couldn't imagine why. So I revised it and revised it until there was hardly anything in it that was in it originally that really meant anything.

My son is a physician in Miami, and I was talking to him about this. And he said that all the media in Miami tries to picture the Miami crime statistics as a media event, that they're not actually so. And so much so that there's a joke in Miami where one of the TV channels is interviewing a Miamian. He's asked, "Mr. Smith, from your observation is there a crime wave in Miami?" "Oh, no, there's no crime in Miami." "Well, that's fine, Mr. Smith. What is your occupation, Mr. Smith?" "I'm a tailgunner on a bread truck."

It is so ridiculous. They're trying to picture Miami without crime.

So I said, "Is it because his column appears in the Miami Herald that he doesn't want to offend them?" He said, "No, I don't think that has anything to do with it. The only connection

that I know is he's very close to a man named Reming (phonetic) who has channel -- the CBS channel down there, and they've been close for years. And the TV stations are trying to picture the place as . . . so it won't hurt tourism."

Q. By the way, had you met Mr. Anderson before?

A. Never before I saw him there when I called on him. Although my newspaper, the El Paso Journal, carried his column for five years. But I'd never met him.

Q. Who originated the proposals for story ideas?

A. I did initially. I had been working on this for some length of time, and it was after Adkins and Anderson met here in January that slowly everything got taken out of my hands.

Q. Who originated the idea for the -- let me just call it the article without qualifying that I'm talking about the article which is the subject of this lawsuit.

A. Okay.

Q. Who originated the idea for the article?

A. That was originated by Jack Anderson and in a very unusual way. At an early meeting -- I'm not sure just when, but he suggested that someone had come to him with an inside article on . . . on the Spitlight, I believe, someone who had worked here or something like that. And he wanted to know if we would pay $10,000 for this story. I said, "It's ridiculous." And he wasn't -- this was over the phone. And Atkins was sort of -- I said, "Look, it isn't worth $10. I mean what's the point?"

Then I thought it was forgotten about --

Q. Excuse me. When was that?

A. That was before -- I'd say probably in November or December or January, right along in there.

Q. Of '80-'81?

A. Of '80-'81.

Q. And where were you during this telephone conversation?

A. I was in El Paso.

Q. And where was Mr. Anderson?

A. Anderson was in Washington.

Then I thought it was forgotten about. There was another -- he wanted a karate picture of his son and a lot of stuff. His son

was performing in a movie made in Korea or something, and I had just said nothing and stuck it in a brief case and forgotten it.

Q. I guess that's not a local story if it took place in Korea.

A. So by forgetting it -- that's a normal way as an editor to keep from making people angry. You deep six it and hope that it's never heard from again.

Then it went on to where we were actually putting together the first issue, and I thought it was closed in New York.

I had wanted the first issue to have an extensive article on ABSCAM and how it originated and all about it. So at an IRE, Investigative Reporters and Editors, meeting in Dallas I went to the author of a book that was put out by Dutton. Bob Green, who is editor of Newsday, had written in cooperation with Mel Weinberg a book called The Sting Man, and it's the inside story of ABSCAM, how it started, how it got these congressmen involved and so forth.

I knew the book was coming out, and I asked Green if he would be available to do an article for us on the beginning of ABSCAM. And he said that he wouldn't because he and Weinberg had an agreement of 50/50 on royalties, they each had an agent, and he said four or five lawyers were involved and, "Before I could get all that cleared, terms set up, your deadline would be way gone."

So he said, "Why don't you get an advanced copy from Dutton and photographs and make an extensive review of the book and cover that phase out of the book," which is what the New Republic does a lot and some of the others. And I said, "Well, if you can't get the original, you get the second best." So I decided to do that.

I reviewed it myself and ended up with about 15 pages, and Anderson immediately vetoed it. And I couldn't understand how you could veto a book review. So I asked him, and he said, "We're not going to have book reviews." I said, "None?" He said, "None. It isn't just this article. We don't want book reviews." So I thought well, we'll argue about this later, but I couldn't say that. He had in his contract that he could veto anything.

So about the Sunday before the material was to leave New

York in its final form to the printer on the next Monday, which would have been around the latter part of May -- I can get the exact date -- I had a call from New York from Bernie Springsteel. He said that because there'd been a shift of some kind, advertising or something, we had two vacant pages.

Now, my problem was on Sunday afternoon around two or three o'clock to get something to New York by the next day in type with photographs and onto the pages so that it could leave there in a pouch Monday night, I'd have to move fast. So I thought, well, we have this book review on ABSCAM, on The Sting Man, so I'll just reduce it from 13 pages down to about four with art work that would cover the two pages, and we'll go with that.

So I got a hold of a typesetter there, I got the type all set. I dictated a blurb to Bernie on the phone. I told him it was coming on Federal Express and that he would have that in the morning and he could put it all together and we'd have it by five o'clock Monday night to go out, which we did. And we filed the two pages, and that is the two pages . . . here's (indicating) what I'm talking about. You see, Books; he had this set in New York in 72 point. And then he got this cover from Dutton on Monday morning and his picture and his picture from Dutton.

In the meantime I cut this review down from -- this is about a third the size that it would have been. And we ran this. And it filled the two pages and it doesn't look all that bad.

Adkins phoned Anderson -- and this is what makes me think Adkins and he must have had some kind of understanding that I knew nothing about -- and told him that we had done this, which to me was a very simple thing, in an emergency especially. And Anderson called either Monday or Tuesday, and he was so angry his voice was quavering, why I did this against his orders. I said, "Well, there weren't any orders. You didn't want book reviews, but this was an emergency and I had to put something in or we -- " and there's a tremendous financial loss if you miss a printing date if it didn't get there.

So I said, "What can be so important about a book review?" "You know, maybe I should have told you the truth from the beginning." And I said, "Well, what do you mean?" He said,

"Well, I happen to know that the newspapers in the country toward the end of the summer are going to be full of reasons why this whole ABSCAM operation was entrapment." I said, "Well, even if there is, to review a cook doesn't mean that we're taking that position. I mean this is a book review." And he said -- and I said, "Besides, how do you know what the papers are going to have at the end of the summer?" And he said, "Well, I know the defense attorneys."

Well, I've been around newspapers long enough that, bing, when I heard that, that meant he's working with the defense attorneys and this whole thing is going to turn on public relations. It's on appeal now. You guys must know more about the status of it.

And I looked up later in the AP, and I noticed there's an attorney, Kenneth Feinberg (phonetic), Harrison Williams' attorney, and he's not listed in this directory here. And I don't know who that is or how it is or anything.

But this was a fait accompli. There wasn't much you could do about this. And he accepted it reluctantly. And I said, "I just don't see that --" there must be something more. And when he said he knew the defense attorneys, right away there was a conflict of interest. A writer doesn't just know the defense attorneys, especially in a case like that. And I decided, well, there's more to this than I know anything about.

And sure enough, in the end of August there were some newspaper articles that it was entrapment, but they were written by Jack Anderson, and I didn't see any others anyplace.

Here's one (indicating) on Thursday, August 20th in the El Paso Times. "FBI Tactics Should be Questioned" is the heading. Of course those aren't his words.

In essence what he says is that the FBI and the Justice Department should be on trial and not Harrison Williams. His quotation is, "The Senate Ethics Committee is currently investigating a veteran colleague, Senator Harrison Williams, Democrat-New Jersey. The greater need is for a full evidentiary hearing into the tactics that the FBI used to snare a United States senator." And then he goes on defending Williams.

There might be more; those are the only two that I saw.

On Sunday, August 24th, an article appeared in El Paso: ABSCAM, Conmen's Fortunes Take Drastically Different Turns. Now, what he does is belittle Mel Weinberg who worked with the FBI to get evidence on all these various cases, which included art and a lot of other things which I won't go into, that Weinberg was paid while a guy named Joseph Meltzer was -- well, it says, "Meltzer is a broken man. His 280-pound bulk confined to a wheelchair because of arthritic hipbones. He has cancer of the colon, pops pills for high blood pressure and nitroglycerine for a heart ailment. He weeps easily," unquote.

Now, the attempt is that Meltzer got paid nothing because he didn't produce any congressmen. Well, Meltzer was not involved in ABSCAM I later learned. Meltzer was in a sting arrangement in Miami with the Miami police and the Miami FBI, which had nothing to do with ABSCAM and it was unrelated. In other words, it tortuous logic.

Now, I don't know what else, but that's all I saw about this big flood of entrapment stories that the press was going to have. And it confirmed what I thought, that he's working with the defense . . .

Q. To get back to the article about Mr. Carto --

A. Well, this was the first issue. What I'm trying to point out here is that there is usually more to why a story gets in or doesn't get in and what control anybody has over it.

Q. I'm sorry to interrupt, but as long as you're on that subject, just very briefly can you think of other examples in which you found out that Mr. Anderson might have been motivated by something other than purely journalistic considerations?

A. Yes. The stories on the investigators that we carried were to help along people that have given him information. And also there are reasons -- I couldn't figure out why he was so strong on the Yockey story. And he in front of a witness in El Paso said, "When I spoke to the magazine distributors, it occurred to me -- I noticed that they're virtually all Jewish, and I thought that story would get them to give us better position on the newsstands."

Q. Please tell us all about everything he said of that nature. In other words, can you go back and tell us everything you can possibly remember about everything Mr. Anderson ever said about these articles or about -- by these articles I mean the two under the one heading.

A. The two, okay.

Q. And also did he ever say anything about Liberty Lobby or about Mr. Carto?

A. About in June, before the first issue had ever gone on the stands, along in the latter part of June I received from Washington two manuscripts, quite lengthy, and both had the name of Obert on them.

Q. Do those manuscripts still exist, as far as you know?

A. I have them.

Q. Oh, good. Do you have them with you?

A. No, but I have them.

Q. Would you be willing to let us have a copy?

A. Yes. And as I recall, the name of John C. Obert was on both of those initially. So I called Adkins right away -- and this was before I was completely out of it -- and I said, "Look" -- oh, I know. This was at a time when I had to clear everything through Adkins. I couldn't even talk to Anderson. I had to tell Adkins and Adkins would tell Anderson. So I told Adkins, "These stories are ridiculous. I mean they don't say anything really." And I said, "They're not well written at all. They're terrible. And I don't see any point in our using these." And I tried to make it on the quality of the work rather than any editorial differences, because it was bad.

Q. Did you have any other criticisms of the articles in that manuscript form, or did you simply present part of your criticisms to Mr. Adkins?

A. I told Adkins what I thought. Because there had been a meeting previously to get me out, completely out. Anderson wanted me out 100 percent. And this involves Jay to a great extent. They had it all set, they thought, to have a meeting and they were going to vote me out as editor because of The Sting Man and because of some other things. Anderson could see two things: one, that I was going to be a pain in his rear end in differ-

ent directions because we just were not in tune; and two, that I knew enough about this business to see what was going on, and he didn't want me to have any authority obviously.

Adkins, although he knew the magazine distributing business, doesn't really know anything about editorial -- you know, when you've been in this for 45 years you smell things, know things and all that. Anderson and I had gotten so far apart that . . . then when Jay refused to vote for me to be removed as editor, that -- as it ended up we have 50/50 stock; Jay and I have 50 percent and Adkins and Anderson have 50 percent. So that is when they began working on Jay because he wouldn't go along with it.

Now, I was very -- in fact I didn't want to be editor anymore. It wouldn't have mattered that much to me, and I said that I didn't.

It was then decided -- this was about the 20th of June -- that I would have to use Adkins as Anderson's advocate. In other words, Adkins was going to ride herd over me. I had to get clearance from Adkins constantly because apparently he and Anderson had some rapport as to how they were going to control everything, even to the point where I wasn't to go to the IRE convention in San Diego, which I'd already arranged to go to. I said, "Look, I'm going to go on my own. I'm a member. And whether the magazine pays the expenses or whether it doesn't, I'm going. I've got to go." And they were going to send Adkins.

For some reason, Anderson was afraid I was going to badmouth him at this convention, I think, because when I got there two of Anderson's friends, Les Whitten and Clark Mulholland (phonetic), came to me right away and said, "Hey, what's the trouble between you and . . ." you know. And they were trying to pacify me. And I later found out that he thought I was going to make some big thing there against him or to divulge what had happened. Well, I'm not going to wash my linen in an Investigative Reporters and Editors meeting. But he was afraid, I guess, that I would. That was about the 27th of June. So this happened about a week before when he tried to get me out as editor.

And in effect I was out from that time on because Adkins was in control, and I didn't have -- I had already had Tom Whit-

tle working on the Victorial Peak gold story about two months previous to this, and it was too far along for me to be disassociated from that one completely. So I did work on that, and that's all that I did.

Now, Adkins told me that my criticism of the story about Yockey -- that for that reason Anderson was never going to send another story to El Paso again before it appeared.

Q. Excuse me. You mentioned the story about Yockey. Does that also include the Willis Carto --

A. It includes the Carto -- to me they're the same story.

Q. Let's refer to it that way then.

A. The Yockey-Carto story; okay.

Now, Adkins said that Anderson said he wasn't going to send any more stories there for me to criticize or to denigrate or whatever. And then everything from that time on from the 27th of June or whenever it was run from Washington and the New York office completely, but without authority. There was never any board of directors meeting to say this is going to happen or that is going to happen.

But here's the strange thing. In a corporation -- I've learned a lot about corporations and publishing. If you have 50/50 stock and a thing is done, the accomplishment is the law. I mean how do you get it undone when it's 50/50? And nobody could ever agree on it, so the guy who actually has the authority -- and Adkins arranged then for all of the editorial money, with the exception of Berg's pay, to go to Washington to a special account that only Jack Anderson would sign the checks. Well, we had in our bylaws that it took two directors to sign checks. That's in violation. These are things that are coming up -- I mean the things that were done, just strong-armed, are beyond belief. And --

Q. Incidentally, the result of that vote that you mentioned where Armes refused to vote against you, was there an official result of that vote? Were you discharged or was your status changed?

A. I was not discharged, but my status was changed. From that time on, about June the 20th, I had no authority at all.

Q. Could you date the time at which you officially stopped working for the corporation, The Investigator Publishing Company?

A. Well, I've been going to the office really up until, say, three weeks ago. Because I don't know what's going to happen or what's -- and another thing, I felt that if I didn't go there, there would be things occurring that I wouldn't know about.

Q. So you still are in some sense an editor.

A. I go by there now about twice a week.

Q. Are you still in some sense the editor?

A. Well, really I am by contract the editor. I have a contract that I am the editor and I have certain prerogatives. And if this corporation should survive and become viable, it owes me a lot of money.

Q. Has it made any profit yet?

A. There's no way to tell. I don't know if you want me to --

Q. Maybe we should come back to this later, because your time is limited this morning and I want to be sure I cover what I most need to cover.

Let's take a short break.

(Whereupon, a brief recess is taken.)

MR. LEE: Back on the record.

BY MR. LEE:

Q. You said that you received in the mail two manuscripts, both by Mr. Obert apparently. What was the fate of those manuscripts then after you complained about them?

A. They remained there, and we did nothing with them. Apparently there was a rewrite done here in Washington and it was divided into two -- I had the idea that these would both run simultaneously.

Q. Well, they did.

A. Yes, but with Obert -- I don't remember now exactly what I thought, but I had the feeling this was one article and I said that it was no good and it was ridiculous. So that's the last that I had anything to do with it.

Q. So there were other copies of the manuscript in Washington?

A. There were other -- This was a Xerox, yes.

Q. Yours is a Xerox?

A. Mine was a Xerox. And from what I see here, this is entirely different. This is a rewrite, an entirely different story; with the same intent, but a different story than what originally I had seen.

Q. What would you say the intent was in your opinion?

A. Well, it was to establish that America's Hitler was Francis Parker Yockey. And the ridiculous part is there's a man that died in jail in San Francisco 20 before and was certified as a lunatic by the U.S. Army. Now, to say that he's America Hitler even is chronologically impossible.

Q. You said you did no work at all on the manuscripts for the article other than complaining about them?

A. Complained about them, yes.

And then, by accident -- now, you see, Adkins and Anderson put this whole thing together. It was redone in New York and there is a page here where apparently Adkins was taking over as editor because there's a message from the President of The Investigator.

Q. When you say it was put together, you're referring to this whole second issue?

A. The whole second issue was done in the office in New York at 200 Park Avenue.

Q. Whose office is that, by the way?

A. That is The Investigator office, but primarily for advertising and for the art director. But that's where it would have been done anyway.

Q. You just said that the work on the articles that I'm concerned with was probably done here in Washington.

A. Oh, they were written in Anderson's office on 16th Street.

Q. And did you learn any more about who was rewriting or who had written them?

A. I got a copy by accident; they sent us the brown lines, which is a proof for the people who have something to do with the color. Now, it showed this (indicating), but not in this detail; you could hardly make out what it was.

Q. Referring to the cover.

A. The cover. What we received was this (indicating) and this (indicating) and this (indicating).

Q. Could you describe that so when somebody reads this they'll know what you're talking about?

A. All right. What we received was a photostat, for all intents and purposes, of the cover. And then we received a proof of pages 22, 23, 24, 25, 26, 27 and on. When I looked on page 27, I saw a picture here of a mustached individual who is holding his hand up like Hitler or something, and it had underneath a cutline saying, "Carto, whose speeches were once a staple of utlra-right gatherings, no longer speaks in public." Well, that would indicate that this individual was Carto. And I called Springsteel and I said, "Bernie, that's giving the wrong impression. You'd think that this was Hitler. You've got Hitleresque features and you've got the name Carto underneath." And he said, "What?" And I said, "Well, that's the way it turned out." And he couldn't believe it.

Now, he's the art director, and perhaps if you had just gotten that and you didn't know much about anything, you might not pay attention to it. But I'm a little more aware or something. And I saw this and I said, "That could be libelous." I said, "You'd better get that off there." He said, "It's already gone."

Q. Gone where?

A. To Mount Vernon, Illinois where the printer is. And I didn't have the authority to do anything other than point it out to him.

Q. Was there anything further that happened after that episode about the picture?

A. Nothing.

Q. Do you know who drew these pictures?

A. I only know what this says up here (indicating). No, I don't know who drew them. But there is a credit. Cover artist is Chuck Hamrick (phonetic), which is this (indicating). Now if he did them all, I don't know.

Q. Do you know who would have assigned the art work? Obviously you didn't do it in this case.

A. No. And it could have been assigned either by Anderson or by Springsteel. And I don't know who did it.

Q. Do you know whether Anderson would have seen these pictures prior to the publication, prior to the printing?

A. He would have to.

Q. I don't want to ask you to assume things, but do you know? Considering that the work on the article was done here in Washington, do you know anything further about what individuals might have participated in the preparation of the article and, for example, deciding this picture should go in here or deciding what headings should be put on the story?

A. I don't know who decided that But these drawings had to have been suggested by someone, and I don't know. I could find out by talking to Bernie. I didn't ask him who did them. I just pointed out that this one -- and he acted as though that had not struck him as a likeness of Hitler or something.

Q. Would Mr. Springsteel have seen the picture in conjunction with the caption?

A. Yes, because he would have put them both in place.

Q. Did he actually do the paste-up?

A. Yes, he did.

Q. So if he didn't know the libelous significance of this, it was not because he didn't see it first?

A. It was not because he didn't see it. Bernie I don't think read these articles. He's an artist.

Q. Did you find out anything else about who worked on the article here?

A. No, but knowing the regular procedures, I would say that in the final version that the men's names on there probably were not the writers. He has some good rewrite men on his staff, and I would say that much of the work that comes out of his office is done by rewrite men and not the names of the people who are over the articles.

Q. Do you have any knowledge at all of the sources of this article? For example, do you know anything about people who were quoted here or where the information was --

A. No. I really didn't read them that much. I read about the first page or so of the first one, and they -- I just -- I mean there wasn't any point in reading any more. I read the part where Yockey was certified insane by the Army and was dead. Now, on

the face of it, because a man who met him in California and shook hands or something and 20 years later becomes . . . and then to say . . . this is misleading . . . America's Hitler, Francis Parker Yockey, and the picture. This is dated October '81. This man died in jail in San Francisco 20 years before this and was adjudged clinically insane.

Q. Did you read any of the article about Carto?

A. I did read it afterwards, when I saw this (indicating). Incidentally, we were not even sent copies of the magazine finished. I got this a long time, I imagine, after you did. And I did read -- I read fast. I didn't read it in any great detail.

The thing I was interested in, I'm from Indiana, and someplace I read he was from Indiana.

Q. But you were reading it after publication in this case?

A. Right.

Q. Did you ever meet or talk to Mr. Obert?

A. No. I'm not sure there is such a guy. It's a name on a story.

Q. What about Mr. Bermant?

A. I met him, and I know that he has been with Anderson since about last October.

Q. What is his function or position with Anderson?

A. As far as I could tell, he was a kind of a go-for. He just went for this and went for that and was a -- he was supposed to be working directly with us and he was getting $10,000 and he really didn't work for the magazine entirely. He worked for Anderson.

Q. Where did you meet him?

A. New York when we were putting the first issue together.

Q. Are you implying that to your knowledge he is not a writer?

A. He worked in Carlsbad; he was on the newspaper in Carlsbad. And when I was asking him about the other, he told me he had tried in Albuquerque and he had had several interviews on the paper there and they wouldn't hire him. And he had interviews in El Paso and they wouldn't hire him.

Q. Do you know anything about his history otherwise?

A. Those two things, and he lives in New York.

Q. He is not located here?

A. His parents' home is in New York. He's here temporarily. He's just out of college or something.

Q. You said something very interesting about Anderson's comments on the reason for running the article. Could you go more into that?

A. Yes. I had not even gotten what we call the brown lines yet. On August 4th we had a meeting in El Paso, and at that time I was airing my differences, how this thing was supposed to be and how it started and how it was ending up, that I had virtually no authority. I combined two things. Anderson wanted to do The Secret Life of Marlon Brando in the first issue, and I had to fight like hell to keep that out. Because we weren't running a motion picture thing.

And then on this one that I heard that the Yockey and Carto stories were in it and I had read enough of them in the form that I have -- and I still have those two manuscripts -- that I said the, "Look, Anderson only has veto power. He hasn't the power to put these articles in. They're grotesque. This is terrible."

And then they reread -- now, for the first time I read what his contract said, and I won't go into it here, but it's so tricky that you could construe it to say that he had absolute and complete -- those are the two words, absolute and complete editorial control.

Q. He was present at the meeting, Anderson?

A. He was present at the meeting. And I had never seen that, although I saw my name on the signature. I hadn't seen those words or I hadn't comprehended what they meant. And he said, "That is absolute and that's the way it is," and blah, blah, blah. In other words, I had no authority and never did have and so forth.

And I said, "Look, this thing (indicating) is garbage. This is ridiculous having a story on a guy called America's Hitler who's been dead for 20 years."

And during the meeting he didn't say anything when we were on the record. So then at a break he came over to me, and Charlie Berg was standing there, and I think maybe somebody else was there, but he said, "Say, I want to explain that story,

why we're running that." I said, "Well, please do." He said, "You know, when I addressed --" on May the 13th in New York he talked to a meeting of all the magazine distributors. There's an association; there were hundreds of them there. I didn't go to the meeting.

Q. Do you know the name of it?

A. No. I was in New York at the time of the meeting. It was the same time we were putting the first issue together. But I don't remember the name.

And he said, "You know, I talked to those magazine distributors and I noticed that they're virtually all Jewish. And really the reason I'm running this is so that they'll be favorable to us and put us in the proper -- give us a prominent position on the newsstands and in the supermarkets."

Q. What distributors were you using?

A. ICD was ours, but there are a bunch of them; there are many, many.

Q. Would he be concerned about any other than the one that's handling you?

A. Well, yes, because -- you see, here's what they were. ICD is a company by Hearst that has offices in New York and so forth, all around. Now, they are the major distributors.

In Washington, for instance, you have a wholesaler who gets things from ICD, from Cable (phonetic), from all these other distributors into the wholesaler here, and he is the one that goes to the supermarkets and gives it the display that it gets. He is known as a wholesaler, while the other is a distributor.

Now, there are wholesalers in every major city, Philadelphia and every major city in the country; there are probably 2,000 wholesalers. This was a meeting of wholesalers. In other words, they were independent businessmen who have a business in a certain city of distributing the magazines in that city.

ICD only makes sure that they get them at the proper time and supervises the distribution. It's a complicated business.

Q. After Mr. Anderson made that remark to you, do you remember whether anything else was said by him?

A. No. That one was enough that I looked at Charlie and he

looked at me . . . and then the meeting was going back. I mean that was beyond belief.

Q. Did you ever find out anything else about where the article came from or who suggested to him that he publish it?

A. Not really, no. I don't know any more than what I've said.

Q. You mentioned you had worked with Mr. Berg before The Investigator was conceived?

A. Yes. He was the managing editor on my newspaper. He's teaching at the University of Texas at El Paso also.

Q. Just for future purposes, could you just give us his complete name and address where he might be reached?

A. Charles Berg.

Q. B-e-r-g?

A. B-e-r-g. And he could be reached through 1717 Montana Avenue. I forget exactly what his home address is. But you could reach him through there.

Q. Is he working for The Investigator now?

A. He was up until there wasn't any more money to pay him, and he went back to the University of Texas.

Q. Is there anybody other than yourself who saw the article down there in Texas?

A. No, but Adkins had an awful lot to do with the editorial content at that time. And at one time when I was in San Diego he and Berg -- he was giving instructions to Berg as to what to do, and there were a lot of funny things going on. That's when Jay Armes' article was killed or put on the back burner and all that. And as soon as I got back Charlie said, "Hey, this guy is doing everything contrary to what we had planned, and I thought you ought to know about it." So that was when the business with Jay and all of them started, with Charlie. And he would be a very important person to depose.

And Adkins is there; he would also. And Elias, the attorney for the corporation, also.

Q. Have any of them discussed the articles, the Yockey-Carto articles, with you since, say, the lawsuit was filed?

A. I talked to Berg on the phone about it. You see, the of-

fice is really not much of an office anymore. There wasn't anyone around to talk to.

Q. Have you spoken to Anderson or any of the other --

A. No, we haven't spoken about anything. They just completely took it and ran off with it.

Q. By the way, did anything of interest occur in that conversation with Mr. Berg that you just mentioned?

A. Only that we were more or less laughing. I couldn't believe really that they were going to do anything like this.

Q. You mentioned specifically that you suggested this drawing was probably libelous --

A. Yes.

Q. -- or whatever your words were. Your criticism of the text itself, which you hadn't read in its entirety, was not apparently that it was libelous?

A. No, it was -- and the reason I was talking to Springsteel who is the art director -- and that is part of a direct thing that he should have some knowledge of, and he has little or no editorial competence that I know of, and I was just pointing out to him that I thought that was a pretty rough and possibly libelous picture. And, as I say, he didn't seem to have paid that much attention, and I wouldn't expect him to. He's not an editorial person.

Q. Have you ever heard of the Anti-Defamation League, the ADL?

A. That's in Colorado, I believe. Or at --

Q. It's headquarters is in New York.

A. -- least I was in communication from the Anti-Defamation League from Denver to the newspaper a time or two.

Q. Have you heard anything about them in connection with Jack Anderson or this article or The Investigator?

A. No.

Q. How about a man named John Rees, R-e-e-s, who works here in Washington?

A. What I know about him I've read in the Spotlight; whatever you had in there is all that I know. And I can't quite figure out his association with McDonald or -- one time it was this way and then back another way and . . .

Q. Do you have any personal knowledge of him at all?

A. I have no personal knowledge, no.

Q. Are you aware of a lawsuit out in California between Mr. Mermelstein, M-e-r-m-e-l-s-t-e-i-n, and Institute for Historical Review? He's represented by a lawyer named Cox.

A. No.

Q. I'm speculating as to -- well, I won't go into it, but you're not familiar with that?

A. No.

Q. And you're not aware of any connection between those people and Anderson?

A. No.

Q. Do you have any knowledge about Mr. Anderson's sources of information?

A. Only Obert.

Q. And you're not even sure he's a real person.

A. I really -- I've never met him and I wondered if that was just a byline name.

Q. You said at one point earlier that Mr. Anderson's staff and Mr. Anderson would have the responsibility for checking the accuracy of stories.

A. Yes.

Q. Could you state then that in the case of the Yockey-Carto article --

A. They would be in total control.

Q. And it would be their responsibility to find out if there were any inaccuracies?

A. Correct.

Q. Have you ever met or heard of a man who is quoted here -- let's run through it briefly in case there is somebody here that you know something about.

I was thinking of Scott Stanley, who works for the John Birch Society.

A. (Nods in the negative.)

Q. Incidentally, I'm mentioning some of these people because they're directly quoted in the articles we're --

A. Oh, I see.

Q. -- discussing.

A. I don't know anything about them.

Q. Well, apparently you wouldn't have any further knowledge of the contents of the article or the sources then.

A. No.

Q. You mentioned that Mr. Anderson seemed to be motivated in his editorial policy, if you want to call it that, by a desire to help people along?

A. Yes. Well, I call it tangling alliances.

Q. Could you just give us a little summary of what you meant by that, please, in terms preferably of your own personal knowledge?

A. In this Investigator magazine I worked for about five months on an article that could be quite important, mining oil as a means of alleviating the shortage. Now, this could develop into something really tremendous.

Sheldon Wimpfen has retired as the head of the Bureau of Mines and lives out here in Luray, Virginia in the mountains. And I went out there a couple of times and worked with him and talked to him and got a very important story on mining oil as differentiated from drilling for it.

In this next issue -- normally when you cover a subject, you just -- you don't do the same kind of an article the following issue. Now, here is one, The Great Oil Gouge, by James Boyd.

Q. And that's in the second issue?

A. This is in the second issue. Now, The Great Oil Gouge is nothing but a rehash, it's nothing new, of this whole thing. I read it and I said, "This is another one that doesn't have anything. I mean it's just a rehash."

Then I discovered that James Boyd, who received X amount -- thousand dollars or more, I don't know just what -- co-authored a book with Anderson called The Muckraker, which is current in paperback. And also he's the one that provided -- he was the administrative assistant to Senator Dodds who turned over apparently the information to Anderson that got Dodds kicked out of the Senate or whatever happened.

Now Boyd is still obviously being -- Boyd is a free-lance writer now, I presume, and the reason we have this article in there is to help one of Anderson's former informants.

In other words, If I had any editorial decision on this, I wouldn't have had it at all, because Boyd isn't my old buddy, he's Anderson's. Now, that's one.

Then when you go to -- well, the Disgrace to the National Archives, I think that's the proper type of thing. That's what I would agree with.

Then there's the one about Williams that I have already enunciated.

Then on these stories about the investigator profiles. Now, there was one in this last issue, I believe --

Q. That would be the third issue?

A. The third issue. The investigator of the month is Dick Bass. Now, that was to run in the very first issue. And in it was a whole bunch of stuff about how he caught everybody in bed. There's a Barbara Hower in Washington, I believe, that in some kind of a divorce proceeding this guy Bass had caught her in bed with some guy in the Caribbean, and a lot of stuff like that. And in the article it called Barbara Hower -- the investigator, Bass, called her a cheap whore, and it was quoted in the article.

Well, the main reason I wouldn't put that in the first issue, I said, "Hey, you can't call people cheap whores." I mean even a whore can say she's not cheap. He said, "Well, it's been published before." "I don't care if it's been published before." This was before I got kicked out. This was making up the first issue.

And another one, "Washington, D.C. hooker, so and so," with her name. I said, "Look, unless you really -- " this is what astounded me, how little his knowledge of things like that. He said, "Oh, that's not libelous; it's published."

Q. Who is saying this to you?

A. Anderson. I said, "The fact it's published doesn't make it not libelous. That has nothing to do with it." And it was to run, and we just absolutely cut those sections out.

Then he finally ran it I noticed in the third one and I can even see where those -- I looked to see real quickly if they were calling her a cheap whore and a lot of other stuff, and that had been removed. At least I got through to him to that extent.

But there are numerous things like that.

Q. How would you evaluate his concern for the accuracy of the stories as far as your contacts with him are concerned.

A. My personal opinion is that they're not too great.

In that one on the Red Cross, he had a guy from New York who did this story, and this called a doctor in California as an instigator of causing the state of California to cause this blood bank problem. To say that an M.D. instigated problems for a blood bank, if he didn't, is libelous. I mean that can hurt an M.D. and his practice out there.

So I didn't just call the doctor. I called everybody that had any knowledge. I found out he was subpoenaed and didn't even testify. So I cut all that stuff out. And I said, "Hey, this thing" -- and there were other things in it -- "You've got some potentially libelous things in here." And I was telling Bermant this in New York. And I just changed them. And Bermant was calling down here and said, "Well, Anderson wants a report on that."

And I can give you a report on what was taken out and why it was taken out and everything. I don't have it with me.

Then he called and he was trying to argue with me about it. I said, "Look, Jack, I was checking these things before you ever went to work for Pearson. I've been in it this long. And I've checked, and these are inaccuracies." "Well, that writer has a great reputation." I said, "He's inaccurate and it's potentially dangerous. So I've changed it."

Well, this is when he realized that we were not going to be able to function as editor and publisher. But there are a few instances.

Q. Did you ever hear Anderson say anything at all about Liberty Lobby?

A. No; only the Spotlight.

Q. What did he say about the Spotlight?

A. He said that it was a relatively large circulation weekly paper here that was ultraconservative, I think, or something like that.

Q. When did he say that and in what context did he say it?

A. When he was discussing the person who came -- now, somebody allegedly came to him who worked here with an expose of the Spotlight.

Q. Do you think that that person is supposed to have still been working here when he went to Anderson, or was he a former employee?

A. I assumed then it was somebody who worked here now. But after I read in there about some woman that goes clear back to Pearson having allegedly brought him something, I thought maybe that's what they were talking about.

But here's an important point. He asked us if we would pay $10,000 for this information. Now, that would be apparently somebody who is apparently current, I would think.

Q. He didn't suggest to whom it would be paid?

A. No. But whoever it was, it was going to -- and then that went out completely, and it came back in the form of two stories by Obert. Now, I don't know if Obert was the one or not.

Q. What went out completely?

A. The idea of paying any kind of money like that.

Q. Do you know what was paid to anybody for these articles?

A. I can find out by the cleared checks, but I don't know. I would guess probably each one of those guys got around a thousand dollars.

Q. Do you know that it was Obert and Bermant that were paid?

A. There would be canceled checks that I could check, I presume.

Q. I'd appreciate it if you could check into that and see.

To your knowledge, was any other person paid anything for the story? In other words --

A. Well, you see, Anderson had a separate bank account in which only he had to sign.

Q. Who put the funds into that account?

A. Adkins. And he kept taking the money away from -- we had no money to operate on, the editorial department, except Charlie's pay.

Now, the reason I was paid for a short time, from April 1 to about July -- first part of July, was I gave up 10 percent of my stock -- I had 30 percent; I gave up 10 percent which left me with 20 -- so Jay Armes could get a greater portion of represen-

tation in the company. And I said I would do that only if I were to be paid -- I mean I wouldn't get recompense for the stock, but if they would just pay my salary during that period, I would turn over 10 percent to Armes.

Q. And they did pay you?

A. They paid me from April until about the 1st of July or sometime early in July. So really that was in return for stock is what it amounted to, but it was in the form of pay

Q. Could you give us a rundown on the current status as far as who is doing what for The Investigator?

A. Yes. Adkins is handling the financing and the business part, and Anderson and his office are providing all the stories and everything. Bernie Springsteel in New York is putting it in type and pictures and doing the manual part of paste-up and so forth. Elias as the corporate attorney has resigned as of about two or three weeks ago.

Q. Do you know why?

A. It would be only speculation.

Q. Then don't . . . .

A. The situation is just so untenable for anyone in El Paso. You know, what do you do?

Q. Off the record a few minutes ago you were making some remarks about the circulation and the financial situation. Would you just briefly summarize that for the record?

A. It's impossible to tell if The Investigator is a profitable magazine at the present time for this reason.

Our contract with ICD provides that from the take-off date on the newsstands they have 90 days before they make a final accounting of what the sale was and how much money is involved and what percentage of it goes to the publishing company.

Our first issue went on the newsstands July 7th, but it was for a period of two months. It was dated September. It came off of the newsstands on September 1. Therefore, under the ICD arrangement we have no authoritative accounting until the end of 90 days. So in early December we'll find out what the sale was, and whatever proportion of that that goes to the company will be paid.

Now, for the second one, that went on September 1 and came off the day before yesterday. So 90 days from now takes us into January of '82, and we'll find out what this sale was.

Now, this one (indicating) went on sale yesterday and will be on sale until, say, November 6th. When that goes off, 90 days after that there will be an accounting for this; in February there will be an accounting for this.

In other words, you're always at least four months behind the printing, and in the first issue five months behind, before you get any accounting of it.

Now, of course you have some intimation of what's going on. I mean you say, oh, it's good, bad or lousy or something. But even that you can't tell for sure.

Q. What happens to the unsold issues?

A. Well, just take Washington. There is a wholesaler here who just the other day picked them up. In the place where I'm staying, it wasn't there the night I got here and it was there the next day, yesterday. He will go around and pick up the September one, the first issue, and the second issue, this one (indicating), will be put in its place.

He'll take all of those back. Now, some of them -- many of them Adkins wanted returned because it was the premier issue and would have some collector item value. So he asked that they return them. But he makes a tabulation, and it has to be fairly accurate because we have applied for membership to the Audit Bureau of Circulations. That is a very tough auditing outfit that establishes really how many you sold and how many you didn't sell. So they have to be fairly accurate.

Now, if he received -- I'd say here they probably got 2,000 magazines. If he picked up a thousand, that means that there were a thousand sold. Now, I've learned that that's a good sale. If you sell 50 percent, that is -- you're a success. That's surprising; it surprised me.

So they pick up a thousand, and there's a thousand that this local distributor -- suppose he gets -- now, he has to pay the retailer, the people in the hotel, X amount for all that they sold for their part. Then he has X amount that he takes for his share. Then he sends the report and the balance to ICD, the regional

office, which may be the same as New York in this area; I don't know. But if it were El Paso, it would probably go to Dallas. And the regional office then forwards it to New York. And it takes 90 days for all this stuff to clear because it has to be fairly accurate. I mean they're paying out money. Advertisers are buying readership and all that. And that's why I guess it takes that much to look into it.

But eventually in 90 days after it goes off sale -- that means 120 days from when it went on sale -- you get the final returns. I really couldn't say. If we do as much -- I've heard from Anderson and I had a letter that if we do as much as 36 to 39 percent, it is a successful publication; if you do 50, it's very good.

Q. That's 50 percent of the printing?

A. Of the printing, right.

Q. Do you know how many were printed?

A. 400,000.

Q. For each issue?

A. Each issue.

Q. But you don't know at this point whether it's 50 percent, 30 percent, 20 percent.

A. No. And it's all more or less in the tube. It won't really come back to our company in the first three until about February or March.

A. How is money actually paid then back to your company?

A. ICD gets the money. They take off what they advanced for the printing and other things, and pay the balance to the corporation at that time. We should be getting a first check -- which I don't know how much of it is -- I think in the first one there would probably be more deductions than any of the others, but we should be getting at least an accounting in December of the first issue.

Q. What about the bank account that Mr. Anderson has authority to write checks on here in Washington? Do you know where that account is and in what name?

A. Jack Anderson, and it would be The Investigator magazine. The bank is in El Paso. It simply is money put into a special account for him that only he has to sign, which is against our bylaws.

Q. So it's an El Paso bank and he has the checks up here --

A. Right.

Q. -- and only one individual can sign for this.

A. And that's contrary to our bylaws. Everything that they have done virtually has been regardless of bylaws or anything.

Q. Do you know if there's any restriction on what he can use that money in that account for?

A. Well, it's allegedly to be used for editorial work. But who knows.

Q. Do you have access to the canceled checks or the records of that account?

A. I was very dubious about this whole thing, and that's another reason why they wanted to get me out, because I demanded from Adkins a list of all the people that got paid. There's quite a list.

Q. Do you have the list?

A. I've got a list of the first ones, the initial -- and it isn't even all of the first issue, but it was all of them that had been paid up to that time, because as a director I had a right to demand from Adkins, "Look, I want a list of who he's writing checks for." And I've got a list someplace.

Q. Do you have access to --

A. The checks we have access to them.

Q. You have?

A. Yes. And Jay Armes -- that's what one of the big fights is about. Jay doesn't want to turn those records over to them.

Q. Who is "them"?

A. Adkins and Anderson, because he's afraid they'll change the thing.

Q. Does Mr. Armes have custody of the canceled checks?

A. He has custody now because this is the corporate headquarters where he is. But he gave it to an attorney named Mounts.

You see, they agreed to buy stock on August the -- I said, "I want out." I offered my stock in July. I don't even want to have anything to do with it. And they kept hemming and hawing. And then finally it was agreed in a meeting in El Paso on the 19th of August that they would buy my stock and they

would buy Jay's stock in a matter of days. And I never heard from them again.

But as a part of that agreement Jay agreed to take to the attorney, Mounts, who is a top attorney in El Paso, and give the records to him. And when they bought us out, they would get the records. And it was because -- he didn't because he felt that they'd be doctored.

Q. So he has the records of the Anderson --

A. The records now, he either has them at the corporate headquarters or the CPA may have some of them.

Q. Is there another bank account besides the one that Anderson has?

A. Oh, yes. Now, that's another thing. I don't even know how many bank accounts. Anderson and Adkins were writing things back and forth, Adkins was opening up new accounts. And Jay went down and had his name removed from the note which caused the shortage of funds where they have no money right now, as I understand it.

Q. That's what I was going to ask you. What are they living on at the moment?

A. (No audible response; shrugging shoulders.)

Q. Did any of the individuals involved put funds into the corporation? You may have answered that before, but I don't remember.

A. I received a letter, or my attorney did or something, about a week or two ago where Anderson claims that he has paid a couple of phone bills in New York and went to Hawaii and back at his own expense and some stuff like that. But that's all Anderson -- if he has done that, that's all he has put in.

As far as actual cash that I know of, the only guy that I've ever seen put money in is Jay Armes.

Q. Do you know what he put in?

A. Well, on this agreement for me to turn 10 percent of my stock in, Jay put $50,000 into the company for 10 percent of the stock.

Q. So he received your stock?

A. Stock. But it went into the company and out again. They asked if I would do this. Well, I didn't care, but I said, "Look, I

have a contract. I'm to get $50,000 a year. I'll do this, but all I want to do is start getting paid." So they agreed to that. And then I got paid up until, as I said, about 15 weeks or 16 weeks.

Q. You sold your stock and you got paid.

A. What it amounts to, I sold the stock and I got $15,000 or $16,000 for it. But it's in the form of wages in a sense.

Now then, Jay put $50,000 into the company which paid off the original note and started another one, and then he put his name on a note that was to be open-ended for financing straight through. And Adkins put his name on it. But Adkins -- then Jay went down and for good reason, in my opinion, he took his name off of that because we had no more control over what was happening.

And Jay told me that Adkins one day sent Anderson $25,000, I think. And it just got completely out of hand.

Q. And it was all borrowed money rather than --

A. It was really on notes other than Jay put that in and then he bought some typesetting equipment and one thing and another, in the sense that we thought we were cooperating with one another. We weren't being -- dotting the i's and crossing the t's, until Jay found out what was going on and he took his name off.

Q. Do you know how he could just take his name off of a note?

A. Oh, he didn't take it off. He said, "Up to here (indicating); no more." It was an open-ended -- in fact this magazine was murdered.

Q. By whom?

A. By the actions of Adkins and Anderson.

MR. LEE: Off the record a second.

(Discussion off the record.)

(Whereupon, a brief recess was taken.)

BY MR. LEE:

Q. Is The Investigator magazine marketed entirely on newsstands, or is there a subscription list?

A. There ia a subscription list building. There were advertisements in there for them to fill out coupons and everything. The first $4,000 was deposited.

Jay since then has ordered the two girls who receive those to not deposit them, the subsequent ones, which I'd say there's probably from $16,000 to $20,000 that has been taken in for subscriptions; I don't know how much. But the reason he didn't deposit them, as I understand it, he didn't know what was happening and he thought that some of the things Anderson and Adkins were doing were not entirely -- I wouldn't say legal, but that we could be responsible. For instance, he explained if you cash a check, that puts you in some sort of position of -- for the postal authorities and so forth. And he didn't know if we'd be able to fulfill a subscription. The way things are going, we don't have the controlling voice to do it. So he just told them to pile the checks up and to keep the subscriptions in that manner.

Now, I don't know exactly how many, but I would guess that we've received probably a thousand, something like that, at $18 apiece. So it's someplace in the neighborhood of $18,000 I would guess.

Q. Did you send out any mailings in an effort to get subscribers?

A. No. Our aim primarily was for newsstands. And I learned from this that that is a . . . a magazine can make it just on newsstands if you have the proper promotional people behind it.

Q. Is the magazine distributed fairly evenly around the country? Is it distributed in every state?

A. Yes.

Q. Sold in every state?

A. (Nods in the affirmative.)

Q. And the difference in sales per state would be primarily based on population?

A. Yes. I would guess that you'd sell more of them on this eastern seaboard probably than other places. But it is distributed throughout the United States.

Q. What about the advertising in the publication?

A. That was done -- now, the first issue, the girl selling it is named Patty Gornish. She sold these for only $10 because we had no track record. Until this whole things comes in, you don't know what you're selling anybody.

Q. $10 per spot?

A. Per spot, per page, roughly.

Q. Would you just spell her name?

A. G-o-r-n-i-s-h.

Q. And she's in New York?

A. She's in New York, yes.

Q. The funds which are received for advertising would then be sent to whom?

A. The funds would be sent to -- this last issue has got a whole new place. The latest one says to Business Office, 930 Thunderbird, El Paso, Texas 79912. Now, that's Adkins' residence. Now, this is how far they've gone without any meeting of the board of directors or anything. They just simply start doing something like that. That's a part of the problem.

Q. Is there some sort of agency which is handling your advertising?

A. No. I originally arranged for Bob Burnback to be our ad representative, and he is a good one. He also represents the Saturday Evening Post and other magazines.

When Adkins went back to New York and to Washington in January, there's a difference that developed between them, and I don't know what happened. But Burnback quit. He said he didn't want to have anything to do with it. He had a misunderstanding with Adkins or something.

And then I said, "Well, that's as much as I'm going to do. I had arranged for Burnback to do it. Adkins, you take it over. You find somebody to sell advertising."

And he finally arranged to have Patty Gornish do it. And I can understand how in the first issue or two -- although Burnback, our plan was to charge for advertising from the beginning and then prorate it. If we didn't sell that many, then we'd only charge them for whatever there was.

But they decided that the best thing to do would be to get the ads in and then just charge $10 and then start selling when we have a certified amount of readers to be able to sell it.

Q. Is she an employee then, or is she an independent agent of some kind?

A. She is an independent agent.

Q. I was just noticing, and my impression is there's an awful lot of liquor advertising in here. Is there --

A. Well, they're the ones --

Q. -- any particular reason for that?

A. -- that are easiest to get.

Q. Why would that be?

A. They do a lot of advertising and -- for instance, Mercedes and Rolls Royce isn't going to advertise in a magazine that they don't understand its editorial policies completely. And I'm using those two as the epitome of that type of -- you see, an advertiser is very careful of what kind of a publication he gets in. And the fact we're sitting here shows that they're pretty smart not to get involved until they know exactly what it is they're buying.

But liquor and cigarettes -- it's a good deal for them. I mean 400,000 printed and they get them for just about nothing. Of course there is a sort of implied obligation that when we do have the figures, they'll go along with it.

Q. Have you been in Mr. Anderson's office here in Washington?

A. Yes.

Q. Could you just briefly describe what it's like, what size it is, how many people are there?

A. There's a huge red brick -- I would say even an historic building at -- the address . . .

Q. I think we have the address in the phone book.

A. . . . is 1401 16th Street, Northwest, Washington, D.C. That looks to me like a building that was about the style of the 1885 to 1890, red brick, huge structure, in which he and a law firm share accommodations there.

Now, he I know, and I think the law firm, own the building or it might be mortgaged -- I don't know that status. And he told me that all the buildings behind his place there on that street that's behind where I'm staying at the Holiday Inn, that most of those buildings they own too. Whatever law firm that is, they're on the ground floor.

When you go in there you go up some steps to a door that is kept -- I imagine it's kept locked, you have to press a button to

get in. And you open that and you turn to the left and you come to his office. There's a receptionist here and there are other guys -- Joe Spear works in one of them and somebody else in another one. And I've never been all around it. But adjacent to Anderson's office is the office of Opal Ginn, who is his administrative -- the one we were talking about.

Now, that's as much of that office as I've seen. I know it's much larger than that, but that's all I've ever seen.

Q. Do you know if Mr. Anderson normally goes in there to work?

A. Yes.

Q. Every weekday probably?

A. Yes, except when he's out making speeches.

Q. Have you ever been to his home?

A. Yes.

Q. My purpose in asking this is because we're having difficulty serving him, and I was wondering --

A. Well, his home is way out in Maryland in a very rural atmosphere. You go back on a single road to his place. That's why when I saw the home address -- it's a tough place to find if you're just looking for it.

MR. LEE: I don't have any further questions, Mr. McGaw. I thank you very much for coming here.

I would like to ask you if I could make a direct statement here, that your presence in Washington at this time was not solely in order to have your deposition taken.

THE WITNESS: No. I was here for several reasons, one of which is to attend the American Writers Congress in New York this Friday, Saturday and Sunday. And it was cheaper air fare to come to Washington and then go to New York and come back again.

MR. LEE: And you had planned that trip before?

THE WITNESS: I had planned that trip a long while ago. But I can fly round-trip from there to Washington for $480 and round-trip to New York for $618.

MR. LEE: I want to thank you again very much.

If Mr. Gentry has any questions, I'll give him the floor.

MR. GENTRY: Mr. Lee, I don't have any questions, but

for the record I would like to thank you for inviting me to come down representing Mr. Armes. And to the extent that it's beneficial, from the interviews I've had with Mr. Armes all of what Mr. McGaw has testified to conforms with his statement of the situation, particularly with regard to Mr. McGaw's and Mr. Armes' lack of any involvement or control over the second issue in which the offensive articles are. And it's something that we will continue to talk about, you and I, with respect to Mr. Armes.

MR. LEE: I appreciate your coming over on such short notice; I'm glad you could.

Thank you, Mr. McGaw.

You have a right of course to read this and sign it. If you don't want to, you can waive signature.

THE WITNESS: I'll waive it.

MR. LEE: You don't have an attorney advising you. Do you want to call your attorney before you leave today?

THE WITNESS: Not necessarily. What do you think? I mean what I've said I've said.

MR. LEE: Well, many people waive it. It's just that if you -- well, either way suits me. If you sign it, you're a little more stuck with it than you are if you don't sign it.

THE WITNESS: It's all right as far as I'm concerned. I've never signed a deposition before so I won't start now.

(Whereupon, at 12:05 p.m., signature having been waived, the instant deposition was concluded.)

CERTIFICATE OF NOTARY PUBLIC

I, PATRICIA A. FOYE, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing eighty-five (85) pages was duly sworn by me; that the testimony of said witness was taken down by me by Stenotype and thereafter reduced by me to typewritten form; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition is taken; and, further, that I am not a relative of or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

PATRICIA A. FOYE
Notary Public in and for
the District of Columbia

My commission expires February 14, 1984.

APPENDIX I

DEPOSITION OF JACK ANDERSON

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC.	:	
and	:	
WILLIS A. CARTO,	:	
Plaintiffs,	:	
	:	Volume I
v.	:	Civil Action
	:	81-2240
JACK ANDERSON, et al.,	:	
Defendant.	:	

Washington, D.C.
Monday, April 12, 1982

DEPOSITION OF:

JACK ANDERSON,

a witness, called for examination by counsel for the Plaintiffs, pursuant to notice and agreement of counsel, in the offices of White & Case, 1747 Pennsylvania Avenue, Northwest, Washington, D.C. 20006, beginning at approximately 1:20 o'clock p.m., before PATRICIA N. LOCKE, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

APPEARANCE OF COUNSEL

On behalf of the Plaintiffs:

FLEMING LEE, ESQUIRE
300 Independence Avenue, Southeast
Washington, D.C. 20003

On behalf of the Defendants:

DAVID J. BRANSON, ESQUIRE
1747 Pennsylvania Avenue, Northwest
Washington, D.C. 20006

Also Present:

TRAVIS McCOY
Assistant Research Director
of Liberty Lobby

(EXHIBITS OMITTED IN PRINTING OF JOINT APPENDIX)

EXHIBITS

	FOR IDENTIFICATION
Plaintiff's Exhibit Nos. 1 thru 7	78
Plaintiff's Exhibit No. 8	85
Plaintiff's Exhibit No. 9	90
Plaintiff's Exhibit No. 10	91
Plaintiff's Exhibit Nos. 11-12	92
Plaintiff's Exhibit No. 13	93
Plaintiff's Exhibit No. 14	93
Plaintiff's Exhibit No. 15	94
Plaintiff's Exhibit No. 16	95

Whereupon,

JACK ANDERSON

was called as a witness and, having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFFS

BY MR. LEE:

Q. Would you please state your name?

A. Jack Anderson.

Q. Your address, please?

A. 1401-16th Street, Northwest, in Washington.

Q. Is that your home address or your business address?

A. Business.

Q. Would you give us if not your home number, at least which state or town you live in.

A. Maryland.

Q. Where were you born, Mr. Anderson?

A. United States.

Q. Would you like to tell us what city you were born in?

MR. BRANSON: We have objected to questions like that in your interrogatory answers and I would take the same position here.

MR. LEE: We might as well get into this point now, then. These are routine questions which are asked of all witnesses.

I have never heard of anybody objecting.

MR. BRANSON: He answered the question. It is the jurisdiction of the courts of the United States. What more do you need to know?

MR. LEE: It is very helpful to know the personal history of a witness in order to evaluate his background and so forth.

MR. BRANSON: Mr. Lee, you know the background of Mr. Anderson.

MR. LEE: If I know it, what would be the harm in telling us what city he was born in?

MR. BRANSON: We could waste about six days talking about an irrelevant matter. That is an irrelevant matter.

MR. LEE: Have you never heard people ask in depositions when and where they were born and their educational history?

MR. BRANSON: Some yes, and others no. We have already spent five minutes talking about it. The costs to both of us are --

MR. LEE: I could, I suppose, at this point cite you a few authorities on this just to get it on the record.

MR. BRANSON: I am aware of the law in this matter. If you wish to make a motion to compel, you are free to do so and we can both tell the court relevant authorities.

MR. LEE: It suits me. I have the authorities here, but if you are not going to be swayed by the authorities, then there is no point citing them to you.

MR. BRANSON: I didn't say I wasn't willing to consider the law.

If you wish to do this, there is an appropriate form and that is the court.

MR. LEE: I will go ahead and ask the questions and you simply object or answer as you please.

Q. Would you please tell us your educational history?

A. I attended college.

Q. You attended college?

A. Yes.

Q. Did you receive a college degree?

A. No.

Q. What subject did you study?

MR. BRANSON: Objection. That is completely irrelevant. Don't answer that.

MR. LEE: Again, not to belabor the court, but it seems to me that Mr. Anderson is a journalist and this case involves journalism.

It seems to me that his background and qualifications would have a bearing on his actions in this case.

MR. BRANSON: Both the court, you and I can take judicial notice of Mr. Anderson's background as a journalist. We all know what it is.

MR. LEE: I know his background generally. I haven't studied Mr. Anderson in my own education.

MR. BRANSON: He has answered the question to the extent he is going to answer it.

BY MR. LEE:

Q. I would like to ask you to please give me a brief synopsis of your employment since you left high school.

In other words, I assume you obviously graduated from high school, is that correct?

A. Yes, I said I attended college. You have to graduate from high school.

Q. That is what I assume. If you would start with your graduation from high school and tell me where you have been employed since that time.

A. Salt Lake Tribune, the U.S. Army, Church of Jesus Christ of Latter Day Saints, and the Washington Merry-Go-Round.

Q. In what capacity were you employed by the publications which you mentioned?

A. As a reporter.

Q. Just briefly, how did you happen to come to work on the Washington Merry-Go-Round?

A. Applied for the job.

Q. For the sake of anybody who may hear this in the future who is not entirely familiar with this matter, could you please tell us whether your present newspaper column, which most poeple are familiar with, is a continuation of the Washington Merry-Go-Round which you mentioned earlier?

A. It is.

Q. When did you personally -- maybe I am assuming too much.

Would you please tell us at what time you began to take charge of the column as opposed to Mr. Drew Pearson?

A. 1969.

Q. 1969?

A. Yes.

Q. By the way, to go back to your personal history, have you ever been convicted of a crime?

MR. BRANSON: We have objected to that in the interrogatories.

Don't answer that.

MR. LEE: Again, I have prepared authorities for this, but if we are not going to get anywhere with it, we can include those in the motion to compel.

THE WITNESS: It is Mr. Carto's reputation, not mine, that is being questioned.

MR. LEE: This goes to the question of the veracity and reputation and bias of a witness.

One of the relevant matters in a case like this is not only to find information which may lead to evidence which will enable one to impeach the veracity of a witness, but also in a libel case it can lead to evidence which would show some bias on the part of the witness against the person about whom he has made the publication.

BY MR. LEE:

Q. Incidentally, if I do repeat an exact question to which you objected previously, I am not expecting you are going to reverse yourself here.

So excuse me if I waste your time on this particular matter but I will ask this question.

MR. BRANSON: We never excuse people for wasting our time.

MR. LEE: This current suit in which we are involved now, is this the only lawsuit in which you are involved at the present time?

MR. BRANSON: Objection. Don't answer that.

MR. LEE: Incidentally, I also have authority for the fact that the attorneys should not instruct witnesses not to answer questions.

Would you like me to cite those?

MR. BRANSON: You began this -- and

THE WITNESS: Every attorney that I have ever had has been violating the rules.

MR. BRANSON: You began this deposition with the purpose, I would believe, of questioning Mr. Anderson.

You have asked about three questions of Mr. Anderson and given at least 20 minutes of speeches. Now if we are going to take Mr. Anderson's valuable time, we better ask them.

He is not here to listen to debates between the lawyers. If it gets to the point if he has to leave because of other matters, it will be because you have taken up too much of the time, not because he is not here to answer questions.

MR. LEE: I am asking and he is refusing to answer.

MR. BRANSON: You are giving speeches.

MR. LEE: No, I am not. I will not cite you the cases, then.

However, in the motion to compel I am going to point out that there is precedent and I think uncontradicted precendent, to the point that an attorney, if he has an objection to the question, he may not or should not instruct his client not to answer it. He should object to the question, permit it to be answered and then later take it up with the court.

MR. BRANSON: There are two ways to handle that situation: One of them is to instruct the witnesses not to answer; the other is to move for a protective order.

I have instructed him not to answer it because we have done the same thing with the interrogatory questions.

We wouldn't have any purpose in objecting to the interrogatory questions. You have not chosen to compel and therefore it seems the proper situation here.

If you move to compel, the issue will be debated before the court in full and you can cite whatever authority you wish to cite and we will cite what serve authority we wish to cite.

There is no reason for us to sit here and debate this every time a question is asked. We are going to run out of time. Mr.

Anderson has limited time and to the extent that you consume it, it is at your peril, not his.

MR. LEE: Let me put this in the record --

MR. BRANSON: Say what you wish.

MR. LEE: We were scheduled definitely for two days, today and tomorrow.

MR. BRANSON: We're here to answer questions.

MR. LEE: The time, nevertheless, is going to be that amount of time.

MR. BRANSON: That is subject to our agreeing that you're --

MR. LEE: To your not walking out of the deposition.

MR. BRANSON: if you are wasting our time we will get up and leave.

MR. LEE: I would like to say the deposition was agreed to start at 9 o'clock this morning and two or three days ago we heard the secretary has changed the time.

MR. BRANSON: That is a written stipulation filed with the court.

MR. LEE: I am not aware of any stipulation. There was a stipulation that we would have two days for the deposition.

MR. BRANSON: Exactly what it says in the stipulation. The deposition of Mr. Anderson now noticed for March 11, 1982 will be rescheduled for April 12-13, 1982.

MR. LEE: That's correct, but we agreed to begin in the morning and, instead, we are not beginning until the afternoon.

MR. BRANSON: I understand that.

BY MR. LEE:

Q. Have you ever been sued for libel?

MR. BRANSON: Objection. We object in the interrogatory answers.

BY MR. LEE:

Q. Have you ever admitted in print to publishing a statement which was false?

MR. BRANSON: Objection. We objected to that question in the interrogatory.

BY MR. LEE:

Q. Have you ever published a retraction?

MR. BRANSON: Objection. We objected to that question in the interrogatories.

BY MR. LEE:

Q. What is the official title of the newspaper column which you now write?

A. Washington Merry-Go-Round.

Q. Do you write any other regular publication or column or contribution to any periodical?

A. I contribute to other periodicals, yes.

Q. On a regular basis?

A. More or less, some of them.

Q. Would you please name the periodicals to which you most frequently contribute?

A. Parade Magazine, and 50 Plus.

Q. You also appear on television --

A. But there are others.

Q. Do you appear on television?

A. Yes.

Q. Could you please tell us where you appear?

A. On the ABC network.

Q. On what program?

A. Good morning America.

Q. Do you appear there on a regular basis?

A. Yes.

Q. How frequently?

A. Twice a week.

Q. Are you employed for that purpose by the ABC television network?

A. I have a contract with them.

Q. Is that the entity with which you have the contract? Do you know the official name of the corporation?

A. No, as a matter of fact I think the contract is with an agent and the agent has a contract with ABC, but I'm not certain.

Q. What is the nature of the material which you cover on that television appearance?

MR. BRANSON: Objection. That has absolutely nothing to do with this lawsuit.

BY MR. LEE:

Q. Do you make any other public appearances on any sort of regular basis: For example by public appearance I am including radio as well as television.

A. Yes.

A. Do you have a radio program?

A. I do.

Q. What is the name of the program?

A. I don't know that it has a name other than my own.

Q. Would you please describe it? I am not familiar with it.

A. It is a new show.

Q. What length is it?

MR. BRANSON: Did it begin after October, 1981?

THE WITNESS: No.

BY MR. LEE:

Q. When did it begin?

A. I don't recall.

Q. Well, within the past three years?

A. No.

Q. Further back than that?

A. I would think so.

Q. What length of time in other words, does it last: Half an hour, fifteen minutes or two minutes?

A. I think the entire show lasts five minutes but my part doesn't. It includes commercials.

Q. Is that done on a profit -- are you paid by anyone for that program?

A. Yes, I don't contribute to it free.

Q. Who pays?

MR. BRANSON: Objection. That's irrelevant.

MR. LEE: I think Mr. Anderson's business connections are relevant in that it may show, for example, his motive in publishing this defamatory article about my clients.

MR. BRANSON: You say it is defamatory. I can't see how when, why or he is paid to do a radio program has anything to do with the Investigator Magazine.

MR. LEE: It is debatable but I am simply trying to find out who pays Mr. Anderson to do his radio program.

Have you objected?

MR. BRANSON: Yes.

THE WITNESS: I am going to always follow the advice of my attorney. So if he gives me advice you can assume that I will take it.

MR. LEE: In that case I wasn't sure whether I had heard he had objected to that question.

BY MR. LEE:

Q. In about how many news papers is your newspaper column published?

A. 950 or more.

Q. How about lectures or speeches, do you make public appearances of that nature?

A. Yes.

Q. Who arranges those for you: Is there a lecture bureau, or do you arrange it yourself?

A. A lecture bureau.

Q. About how often do you lecture publicly, on the average?

A. Once a week maybe.

Q. Is there any particular pattern to the types of places where you lecture or is it a wide variety of different places?

A. Wide variety.

Q. Would you give an example of the kinds of places you might have appeared, say, in the period during which the articles about Mr. Carto and Liberty Lobby were prepared?

A. Universities, conventions, banquets.

Q. Do you speak on different topics on those occasions or do you have a general subject --

A. Different topics.

Q. Have you in your radio program, television program or any of your lectures, to your recollection, referred to or discussed Willis Carto?

A. Not to my recollection.

Q. The same question. Have you ever, in any of your lectures, radio broadcast or television programs referred to Liberty Lobby or the Spotlight Newspaper.

A. Not to my recollection. I might have been asked a question about it. If so, I would have responded.

Q. I believe that in the answers to interrogatories you said that you owned a controlling share in something called Jack Anderson Enterprises, Inc., is that correct?

A. That's correct.

Q. Could you please tell us the nature of Jack Anderson Enterprises, Inc.? In other words --

A. It is a corporation.

Q. Are you the sole shareholder?

A. I am not sure. I am not sure whether my family is involved in it or not.

Q. What is the function of the corporation in relation to your publications, if there is any such relationship.

A. I work for and my reporters work for Jack Anderson Enterprises.

Q. I see. So Jack Anderson Enterprises pays the bills of what we would probably call your staff?

A. That would be correct.

Q. They also pay for the office space in Washington which you have identified?

A. Yes.

Q. Was there -- what was the connection, if any, between that corporation and the Investigator Magazine?

A. None.

Q. No relationship?

A. No.

Q. Do you have any ownership interest in any other businesses?

MR. BRANSON: Objection.

MR. LEE: Does that objection extend to all Mr. Anderson's business relationships?

MR. BRANSON: He has described many of his business relationships and associations. The objections relate to those not described and discussed, to the extent there are any.

MR. LEE: I am not sure which ones you are referring to. Do you mean the ones he has just finished discussion here?

MR. BRANSON: Yes. I am referring, in particular, to any relationship with the Investigator Publishing Company.

MR. LEE: In what way are you referring to it?

MR. BRANSON: In the manner to which we objected to the interrogatory questions directed to Mr. Anderson and/or the Investigator Publishing Company asking for information concerning the status of, incorporation of, the organization - -

MR. LEE: I haven't even come to that topic.

MR. BRANSON: That was my objection.

BY MR. LEE:

Q. What syndicate or distributor handles your column, your newspaper column?

MR. BRANSON: Objection. It is not relevant to this magazine.

MR. LEE: I believe is United Features syndicate. Do you have any ownership-interest in that?

THE WITNESS: No, I don't.

BY MR. LEE:

Q. How about ABC?

A. It is possible I own stock but I don't know that I do.

Q. I am not referring simply to shares of stock but some more major interest.

Are you a part of any partnership or joint venture or business with other individuals in which you are - - in other words, specifically in control or in a position of being in a highly influential position within this business?

MR. BRANSON: I object to that question unless you can show its relevance to this lawsuit and article.

MR. LEE: One thing I think is relevant which I would like to know as we go along is if any of the individuals who were sources of the article or who wrote the article or who, in some way, were involved in the promotion of the article or the conception of the article, if they were people with whom you had a business relationship.

I would like to find out because I think it woud be relevant.

For example - -

THE WITNESS: Let's settle that, no.

BY MR. LEE:

Q. If I seem to be asking that again, I will withdraw it because I may forget as we go along -- I may attempt it in a more specific way and not realize we covered it.

All we can do in that case is have you object or refuse to answer as the case may be.

BY MR. LEE:

Q. I suppose that this question is along the same lines, but I will see what your response is.

Are you now or were you during the period 1979 to the present, which takes in the period during which the articles on which we are suing were prepared, were you, during that time, involved in any business relationship, joint venture or common business interest with any person who suggested or requested that you publish something about Willis Carto or Liberty Lobby or the Spotlight?

A. No.

Q. For purposes of clarity, we are here, of course, because of a lawsuit brought over a certain publication which appeared in the Investigator Magazine in the issue of October 1981.

I am holding in my hand a copy of this publication which I think we could have marked as Exhibit 1, please.

MR. BRANSON: We don't need to mark it. It is attached to the Complaint.

MR. LEE: All right. I don't have another copy but I see you have a copy.

MR. BRANSON: He has the copy that was attached to the Complaint.

MR. LEE: Good.

At any rate, the cover of the Magazine contains the headline, America's Hitler: Francis Parker Yockey.

Since we are all familiar with the article, I will simply state that the article actually consists of two articles which begin on page 20 of this October, 1981 issue of the Investigator, under the large headline America's Neo-Nazi Underground.

We are primarily interested, Mr. Anderson, in the article entitled The Private World of Willis Carto, which is authored according to this publication by Charles Bermant, although there is a second article here, Yockey: Profile of an American

Hitler, which is interleaved throughout part of this article and they are both under a common heading.

So whenever I refer to the article or articles I want to be sure that you understood that I am referring to these articles.

If I say, the article, I am referring to the article about Mr. Carto which is headlined, The Private World of Willis Carto.

As some background on this, let me ask you if this publication, the Investigator, is still being published today?

A. No.

Q. When was it last published?

A. I don't recall. I think that was the next to last issue.

Q. What was the reason for its discontinuing publication?

A. The financial backers withdrew their support.

Q. I know you've objected already to some questions involving your relationship to the Investigator Magazine and the Investigator Publishing Company.

I'm not particularly interested in finding out details of that except insofar as it is relevant as to who prepared, published and edited the article which we are talking about.

So I have to ask you, what was your role, from the beginning of your involvement with the Investigator Magazine until the end?

Did you always have the same function or same relationship or did you go through phases in which you performed different functions or services?

A. I was always the publisher. I later became the publisher and editor.

Q. Do you recall upon what date you became the publisher?

A. No.

Q. Do you recall what year you became the publisher?

A. It seems to me it was about a year before we began publication but I can't remember. I couldn't give it to you positively.

Q. Do you recall approximately when the first issue of the Investigator was prepared?

A. The one that you're looking at is the second issue so the other would have been a month ahead of it. I presume.

Q. The September, 1981 issue?

A. Thereabouts.

Q. Of course, magazines obviously are frequently dated for a later date than they are actually going to appear.

A. That's correct.

Q. So about what time did you become involved in any sort of work for the Investigator Magazine?

A. Maybe a year or so before publication.

Q. So it could have been in the summer or fall of 1980.

A. It could have been.

Q. You said you had two titles. You said you were publisher. Did you say you also were the editor or an editor?

A. I took over the editorship because of dissatisfaction with the editor we had.

Q. Who was the editor that you had?

A. William McGaw.

Q. When did you take over the editorship?

A. I think it was after the publication of this but I can't give you the exact day.

Q. When you say after the publication, this would be after -- in other words, as a journalist, is the publication date, the date on which it appears on the newsstands or the date on which it is dated --

A. The day it went to press.

Q. Do you have any idea when the October, 1981 issue of this magazine went to the press?

A. No, I can't remember.

Q. According to the Magazine and other information which we have, the headquarters of the publication, the Investigator, was in Texas.

However, you're located the Washington.

What was the relationship of yourself and your office here in Washington and the employees here in Washington or the employees of Jack Anderson, Incorporated with the publication in Texas during the period in which the article about Mr. Carto was being prepared and published?

A. No relationship. The individuals had relationships but the Jack Anderson Enterprises had no relationship.

Q. I mention that merely because you said you paid their salaries.

A. Who?

Q. You said your employees here were paid by Jack Anderson Enterprises.

A. They are.

Q. Rather than yourself.

A. They are. When they do work for this magazine or any other magazine, which many of them do, they get paid by whatever magazine they write for.

Q. Were you paid during the year 1981 by the Investigator Magazine?

A. No. I may have been reimbursed for some expenses but I wasn't even reimbursed for all my expenses.

Q. What was the full correct name of the company which published the Investigator?

A. I don't recall. It should be on there.

Q. Right. I think it is the Investigator Publishing Company, but we hadn't mentioned it before.

A. Why don't you open the book and read it.

MR. BRANSON: There it is, Mr. Lee.

MR. LEE: It is the Investigator Publishing Company.

BY MR. LEE:

Q. So you were not employed in the sense of receiving a salary from the Investigator Publishing Company?

A. I was not.

Q. Did any of your employees, reporters or whatever, who normally work for you or Jack Anderson Enterprises, paid by the Investigator Publishing Company?

A. Some of them did stories and got paid.

Q. Well, in connection with this particular story, the ones which you have just described - -

A. No, I don't think so.

Q. What sort of work, specifically, did you do in your function as editor or in your editorial capacity in relation to the Investigator Magazine?

A. I wasn't the editor during this period.

Q. So Mr. McGaw was still the editor up to the time of the publication of this?

A. Yes.

Q. Did you delegate or assign any responsibilities to any of your employees here in Washington in relation to preparing the article?

Again, by the article, I mean the article about Mr. Carto.

A. Both Joe Spear and Opal Ginn did some work for the Magazine. But whether they reviewed this particular article, I can't recall.

Q. Could you please describe, briefly, who those people are?

A. They are both employees of mine.

Q. Turning to the article itself, and if there is a distinction between the article about Yockey and the article about Mr. Carto, who is a plaintiff in this case, please point out the distinction you're making.

What I want to find out is, based on your own knowledge, the entire history of these articles. In other words, they ended up appearing in the Investigator Magazine. Obviously, the preparation had to begin some time before that.

Can you tell me, briefly, what is the first knowledge you ever had that such an article may be proposed or written?

A. No, I can't.

Q. Well, could I ask you why you can't? Is it you don't recall?

A. I don't recall. We talked about many stories. Story conferences last for a long time. Many ideas come up and are discarded and I don't have a computer to keep track of those discussions.

Q. Do you have any recollection of the first time that you did have any awareness of this article?

A. It's all foggy to me. We discussed many different articles. Those discussions were endless and, just as I wouldn't expect you to remember all your discussions over the past two years or year and a half, I don't think you really expect me to remember all mine.

Q. When you say, "We discussed" it, are you referring now to -- well, to whom are you referring to when you say "we had story conferences"?

A. I had story conferences with writers. I had story conferences with the editor. I had story conferences with various people who proposed it.

We talked about -- we had many proposals for stories and many discussions of those proposals. It was almost an endless process.

Q. And the people you are referring to in that answer are people who worked for or with the Investigator Magazine?

A. That's right.

Q. You're not referring to any other group of people?

A. Oh no, we have a lot of freelance ideas, proposals, suggestions, so there were a number of discussions with people who did not work for the Magazine.

Q. Was this article proposed to you by a freelance writer or was it assigned to somebody?

A. I don't recall just how it came up.

Q. Do you know who wrote the article?

A. I see the name on it but it doesn't necessarily mean that the gentleman's name that appears is the one.

MR. BRANSON: We have answered this before.

THE WITNESS: My recollection is it was written by the people whose names appear on the articles.

BY MR. LEE:

Q. What is your first specific recollection of the article in any form -- was it when it appeared in print or was it a few days before it was published?

Did you ever see a copy of it before it was published?

A. Yes.

Q. I am asking you to go back, if possible, and tell me what you do recall. You have said several things that you don't recall?

A. I recall seeing it before it was published.

Q. Do you recall where you saw it?

A. No. Probably in my office but I can't be sure of that.

Q. Do you recall who showed it to you?

A. No. No, I don't.

Q. Do you recall what form it was in when you saw it?

A. To the best of my recollection it was in draft form, not the final form that we now see it in.

Q. That would have been presumably in the form of a typed draft, a typed manuscript?

A. Yes, by the original writer.

Q. Do you have any idea whether more than one person was responsible for the writing of the article about Mr. Carto?

A. I think they were rewritten but I can't recall. I think, in any case, the reporter whose name appears on it is responsible for the story and any rewriting would have had to have been submitted to him for his approval.

Q. I would like to ask you in a little while about the particular individuals involved but in this case.

I am still trying to track down the history of the conception.

A. I know what you're interested in.

Q. I am trying to find out whether you, as the publisher with editorial capacity, had some further awareness of the preparation of the article.

A. Same awareness that I had of other articles.

Q. Do you have any idea who supplied the idea for the article in the first place?

A. I can't remember how it came up, which I think is a question I already answered.

Q. Why did you feel that the article merited publication?

A. I thought it had news value.

Q. Let's restrict ourselves to the article about Mr. Yockey. Did you think that had news value?

A. Yes.

Q. Why would you think that had news value since he had died many years before?

A. So has John Kennedy but I read a story on the front page not too long ago.

Q. Did you feel this article revealed new information?

A. Yes, we had the FBI files. It was all new.

Q. If you can't tell me who supplied the idea for the article, or whether it was assigned or freelanced, can you name any person or persons who can supply that information?

MR. BRANSON: Mr. Lee, we don't need to be cute. The interrogatory answers that we filed over several months ago identify five or six individuals. Mr. Bermant, Mr. Obert, Mr. Spear, were all involved in the research and writing.

THE WITNESS: That sounds right.

MR. BRANSON: Therefore one would assume that the answer could come from one of those individuals.

MR. LEE: True, but Mr. Anderson is the head man. He is the head of the office here and he is the boss of all these people or any of who are employed by him.

MR. BRANSON: That particular question I thought you wanted to know, and I told you the easiest way to get it.

THE WITNESS: Your assumption wouldn't necessarily be right. If you would interview Kay Graham, who is the boss of the Washington Post, and ask her about stories that appeared in the Washington Post I doubt she could give any more clear answers than I am giving.

MR. LEE: All right. Well, we'll come back to something further on that.

BY MR. LEE:

Q. But the question is then, let's go back to the time you saw the manuscript, do you recall who else was present at that time?

MR. BRANSON: You have asked that question and he has answered that question.

BY MR. LEE:

Q. Did you make any suggestions at that time about the content of the publication?

A. I'm sure I made suggestions from time to time.

Q. Do you recall any of the suggestions you made?

A. My recollection is I thought it would be rewritten. That would be my suggestion.

Q. Did you make any specific suggestions about how it should be rewritten?

A. That's possible.

Q. Well, I'm asking you if you can tell me, specifically, anything about it that you suggested be changed from the form in which you saw it at that time?

A. No, because I can't remember what form it was in at the time. If I didn't like the way it was written or if I thought it was dull or uninteresting, the most interesting part is at end, I might have suggested that they start with it.

I might have given suggestions as to how to make it more interesting. Although I don't recall doing it.

Q. Do you recall any specific act which you took in relation to this article other than what you've just described?

A. I recall editing it.

Q. We'll go through the manuscript and then I will ask you what your editing role was.

A. That would be a waste of time because I just remember editing it. I don't remember specifically how I changed it.

Q. Well, we'll see.

Did you have any particular procedures set up for processing articles which were slated to appear in the Investigator Magazine? In other words, could you describe the general procedure by which an article would be prepared, edited?

A. As with every magazine the Magazine is simply a forum for writers. Writers do the preparing. An editor and publisher merely decides which of the many proposals to go ahead with.

The story is left pretty much to the writer to produce, to research and to write. If we don't like the product we might suggest that it be rewritten which I think is what happened in in case.

Q. Did you suggest it be rewritten by the same individual who wrote the first draft?

A. I think not. I think someone else rewrote it.

Q. Did you see the page proofs of this article or either article within that pair prior to its going to press?

A. Normally I would have. Yes, I am quite sure I did because when we went to the -- when the Magazine was put out, I would would have seen it in advance.

Q. Do you know who else in your Washington office, if anybody, would have seen the page proofs to the publication before it went to press?

A. No. I don't know who might have.

Q. Had you assigned any particular individual to follow the

progress of this story in an editorial capacity? By this story, I am referring to the articles?

A. The ones who wrote it are responsible for the story. They would have followed it all the way to the end. I am sure that any rewriting or editing that may have been done was in accordance with the facts. That was their responsibility.

Q. Maybe the most efficient thing to do here would be to go through the list of individuals which was supplied in your answers to interrogatories and then I can come back to some other questions.

I have also added the names of a few people who weren't on your list of whom you may have some knowledge.

I will ask you about Joe Spear first. Could you tell me if he is an employee of yours.

In any case, I am not interested in what he is now but what he was say during the year 1980.

A. I can't recall whether he worked for the Magazine or not.

Q. I believe he is listed on it in some capacity but is he an employee of yours.

A. Why don't you make it clea what you want.

Q. Is Joe Spear an employee of yours?

A. An employee of mine?

Q. Yes.

A. He is an employee of mine.

Q. In what capacity was he employed by you in the years 1980 and 1981?

A. Editor and writer. You're talking not about the Magazine now -- I am having a little bit of difficulty of keeping track of what you are talking about. So the record is clear, I am now talking about my own organization, not the Magazine.

Q. Correct.

A. All right, go ahead.

Q. How long has Joe Spear been employed by your organization as opposed to the Magazine?

A. 10 years or so.

Q. Can you tell me where he could be reached in case we want to take his deposition?

MR. BRANSON: You can reach him through me.

BY MR. LEE:

Q. Do you recall a specific role which he had in the preparation or writing or editing of the article? I believe you mentioned that he and Opal did --

A. I didn't say they did anything. I said they might have. They were in a position where they may have seen it. I don't know that they did.

Q. Does he have a title? Does Mr. Spear have a title or a name for his position in the organization?

A. I would call him the editor.

Q. Just to try to get this straight, is it likely that you considered him the second to you in an editorial capacity as far as these articles were concerned?

A. No.

Q. Who would you have considered immediately under you?

A. Bill McGaw.

Q. After him, who would you have considered to have been in authority? Now I am not referring to the total Investigator Magazine. I am referring to these articles.

A. Charles Bermant.

Q. Was he, at that time, an employee or yours or of Jack Anderson Enterprises?

A. No.

Q. Has Mr. Bermant ever been employed by you?

A. He worked as an unpaid intern for awhile, it seems to me.

Q. When was that?

A. It would have been a couple of years ago. Maybe a year ago.

Q. What is an unpaid intern in connection with you?

A. Student.

Q. You mean he would have come from journalism school while he was still in school?

A. I don't recall where he came from.

Q. And worked at your office here in Washington?

A. As an intern.

Q. Did you know Mr. Bermant before that or was that your first introduction to him?

A. No, I didn't know him before that.

Q. I believe I restricted my question previously to the years '80 and '81. Is he currently employed by you or has he been employed by you since '81.

A. No.

Q. Do you know where he is a resident? Does he live in Washington?

A. No, I don't know. It is in the Washington area.

Q. In our interrogatories, if my memory serves me, you did not identify the individuals in the sense of giving their current addresses and so forth as I suggested.

So, if you do have that knowledge, I would like you to tell me now.

Do you know where I could reach Mr. Bermant?

MR. BRANSON: Through me.

BY MR. LEE:

Q. Charles Bermant is listed at the head of the article about Mr. Carto, as the author.

Q. Was Mr. Bermant the first person, to your knowledge, to work on the article?

MR. BRANSON: Asked and answered.

MR. LEE: I believe Mr. Anderson said that somebody may have rewritten it and he wasn't sure whether it would be the same person.

THE WITNESS: I'm not sure. As far as I know, he was the first and only person to work on the article.

BY MR. LEE:

Q. Was Mr. Bermant then working in a freelance capacity?

A. No, he was employed by the Magazine.

Q. I see. Do you know what his position was with the Magazine?

A. Writer. Editor.

Q. He was employed, in other words, as a full time employee rather than for the purpose of writing a single article?

A. Yes, he was a full time employee.

Q. Do you know whether or not during the time he was working on the article about Mr. Carto, he was employed throughout the entire period by the Investigator Magazine?

A. I am sure he was, yes.

Q. So the article, to your knowledge, and tell me if I am wrong, the article about Mr. Carto, to your knowledge, was prepared solely for the purpose of publication in the Investigator Magazine?

A. That's correct. That's my recollection.

Q. All right.

Had the article, or was the article about Francis Parker Yockey, which appears alongside the one about Mr. Carto here prepared, to the best of your knowledge, solely for the purpose of publication in the Investigator Magazine?

A. To the best of my recollection it was.

Q. Do you recall that there had ever been any discussion between you and any other, prior to your connection with the Investigator Magazine, about the possibility of an article about Mr. Carto being written and published in any form?

A. I don't recall such a conversation and I don't believe one occurred.

Q. The same question as far as an article about Mr. Yockey --

A. Same answer.

Q. Do you recall any -- sorry, let me go ahead with the list of people here.

Mr. John C. Obert is listed as the author of Yockey: Profile of an American Hitler.

Do you know Mr. Obert?

A. Yes.

Q. Was Mr. Obert ever employed by you and, again, let me just make it easy by saying that when I say "by you," I mean you, personally, or Jack Anderson Enterprises.

A. No.

Q. Was he employed by the Investigator Magazine or the Investigator Publishing Company?

A. Yes.

Q. Do you know if his employment was full time?

A. I think he did some outside work. But he gave us all the time we asked or required of him.

Q. Right.

During his tenure with the Magazine, did Mr. Obert live and work around the Washington area or was he down in Texas?

A. Washington area.

Q. I asked you where Mr. Bermant lived, but I didn't ask you this question: During his period of employment by the Investigator Magazine, was he living in Texas, Washington or somewhere else?

A. Washington D. C.

Q. Were these people, Mr. Obert and Mr. Bermant, ever in your offices in Washington?

A. Mr. Bermant was in my offices quite frequently.

Q. Did either of these gentlemen have office space in your premises here in Washington which they use regularly?

A. I don't know that they had regular office space, but they certainly had access to my office.

Q. Other than coming in to talk with you about a specific article or something, what was the nature of their activities while they were in your offices?

A. Who are "they"?

Q. Mr. Obert and Mr. Bermant?

A. Mr. Obert was never in my office except for possibly a conversation.

Mr. Bermant was in more frequently. I am sure he used the telephone, d ks, or perhaps a typewriter, but I don't recall that he did.

Q. Would he have used those facilities, to your knowledge, during the course of writing, improving on and editing the articles?

A. Yes, he had been an intern for me and knew his way around my office and was known to be associated with my magazine, so no one would have barred him from using a phone, desk or even a typewriter, although I think he probably worked more out of his home.

Q. Would you consider that he was working in an independent capacity there for you?

In other words, I mean in your office. I am tyring to get at the fact that he was employed by the Investigator Magazine, but he was working at your office.

I wonder if there was any person in your office who supervised Mr. Bermant.

A. I did.

Q. Did Mr. Bermant ever confer with you about his activities for the Investigator Magazine?

A. Constantly.

Q. And you have already said that you don't recall specifically your discussion with Mr. Bermant about the articles.

A. No, it would have been thousands of them and I don't have that kind of memory.

Q. One of the people listed here is Bob Bartell. Well, Bob Bartell is an employee of Liberty Lobby as far as my knowledge is concerned.

When I say the name Bob Bartell appears, this is one of the individuals whose names was mentioned in your interrogatories.

A. That information would have had to have been supplied by someone other than me. I don't know Bob Bartell.

Q. Right.

I don't think there would be any point in asking questions about him.

In your interrogatories - -

A. I see all the other names on there. The answer I gave regarding Bob Bartell would apply to all the others, except Bernie Springsteel.

Q. I will read the names anyway and we will go ahead.

Robert Eringer. Your answer to Interrogatory Number 31 states he was paid $250.

Do you recall for what Mr. Eringer was paid $250?

A. To the best of my recollection, he was - - I said earlier, I didn't remember where the idea came from. It could very well have been him.

I have a vague recollection that he sent us a freelance story.

Q. So, when you say a freelance story, you mean it may have been the prototype, or whatever, of the article which eventually --

A. Enough to interest us and decide to research it further.

Q. Who is Robert Eringer?

A. I don't know. He has been a freelance writer, I presume.

Q. Had you ever had any other contact with him?

A. The only reason I remember anything at all is because you say that we paid him. If we paid him, then he would have been a freelance writer. There would have been no other reason to pay him.

It does stir my memory a little. It seems to me we did pay a freelance writer who made the original proposal.

Q. But to get back to my question to be sure I heard the answer, did you ever have any previous contact with Mr. Eringer?

A. I don't even know him.

Q. So you can contribute nothing more about Mr. Eringer other --

A. Nothing whatsoever. I may have talked to him during this period. I probably would have authorized the payment which you say I made.

I have a vague recollection that some freelancer did propose this article and I paid him for his idea, and the research that he had done.

Q. Did you have any reason to believe that this individual was reliable?

A. It wouldnt' have mattered. The decision was to go ahead with his idea. We did not intend to use his material.

Q. Do you recall whether his idea would have involved the articles which have appeared in the Magazine about both Mr. Yockey and Mr. Carto or would his idea have referred to only Mr. Carto?

A. I have no idea.

As I say, I didn't even remember it until now. My memory continues to be quite vague of it.

Q. Were the two articles which appeared in this October issue, '81, which I have described, always planned to appear as two separate articles, or were they conceived by two different people as unrelated articles?

A. They were obviously not unrelated.

Q. Do you have any recollection at all of whether there was a decision made to take a single notion and develop it into two separate articles or whether there were two separate articles that came from two entirely separate directions?

A. I have already answered that. They were not unrelated.

Q. In what way were they related? In other words, in what way was the conception of having two articles of this nature, side-by-side, developed?

A. I don't recall.

Q. Have you ever heard of an individual named J. Michael Dunsmore?

A. No.

Q. How about Robert Douglas?

A. No. I can't say I have never met or heard of them in the past, but at this moment I don't have any recollection of who they are.

Q. How about a person named Michael Ross?

A. The same.

Q. One of the people listed in your interrogatories -- your answers to interrogatories, as somebody making some contribution in connection with the subject matter here, is Irwin Suall.

Have you ever met Irwin Suall?

A. Never heard of him that I recall.

Q. How about William Cox?

A. Same.

Q. Mr. Suall works for the Anti-Defamation League of B'nai B'rith, which is the ADL.

A. I have had no contact.

Q. William Cox is the attorney for a man named Mel Mermelstein, who is involved in a lawsuit out in California against the Institute for Historical Review, and I believe they have named a number of other people who haven't been served.

Does that refresh your recollection?

A. I vaguely recall Mr. Bermant saying he had contacted somebody and had furnished deposition material.

This could have been the one. I don't know what it was, though.

Q. Did you make any suggestions to Mr. Bermant or Mr. Obert in reference to these articles about people they should contact for information?

A. I don't recall. I certainly would have if they had asked me. They are both economy journalists and I don't know that they would be required to ask.

Q. The next name which was mentioned in the answers is Paul Valentine.

Do you know --

A. Never heard of him.

Q. I believe Mr. Valentine has written for the Washington Post fairly often in the past. But you have never heard of him?

A. No. A day has been named after him, but I don't know him.

Q. Wes McCune.

Can you identify him at all?

A. Yes, I know Wes McCune. I have known him for years.

Q. Well, could you please tell me who Mr. McCune is? He was listed in your answers to interrogatories.

A. As I said before, the answer came from all the people, not just from me.

He runs, as I recall, some kind of research outfit and I would assume that his name is in there because Mr. Bermant must have talked to him at some point about this article.

Q. Do you remember the name of the outfit that he runs?

A. No, I don't.

Q. Have you ever used Mr. McCune as a source of information in the past?

MR. BRANSON: Objection. Unless you can show me, or tell me, or hint to me why it is relevent.

MR. LEE: Let me ask another question and see if we can lead into that.

BY MR. LEE:

Q. Was Mr. McCune's name listed here, as far as you

know, because he had some connection of some description with the article about Mr. Carto or Mr. Yockey?

A. I don't know. I did not talk to him about the article.

Q. Well, it stands to reason, for example, that if somebody who is in your office frequently and is conferring with you, consulting somebody as a source, that there would be some light shed on his reliability as a source, if I could find out whether you relied on the same individual in the past.

MR. BRANSON: He testified that Mr. Jim Bermant may have talked to Mr. McCune, but he doesn't have knowledge about that.

MR. LEE: But you objected to the question of whether or not Mr. Anderson has ever used Mr. McCune as a source.

MR. BRANSON: He has answered questions about this article and his reliance on Mr. McCune, or lack thereof, or whatever existed.

I object to questions that go to sources for articles that aren't relevant to this lawsuit, i.e., any other article other than the two here.

BY MR. LEE:

Q. Since, apparently, and I am not saying it is the fact, but since apparently, someone who worked on the article may have consulted with Mr. McCune or received information from him in some form, can you give me any reasons which you personally feel would make Mr. McCune a reliable source of information?

A. I have known Wes McCune for a long time. I know that he does exhaustive, extensive research on right-wing organizations.

I haven't had occasion to examine his research or to evaluate it.

Q. Well, since your attorney has objected to telling us if you have used him as a source in the past, I think we are at a dead end until we talk to whoever it was who put his name to the answers to interrogatories.

Dotty Shelton. That name apears on the list. Do you have any personal knowledge of who that is?

A. Never heard of her as far as I can recall.

Q. How about Thomas Francis?

A. Again, I have already answered. I told you I didn't know any of the others.

Q. Before we get to Bernie Springsteel --

A. I do know Bernie Springsteel.

Q. There is another name, Susan Hamburg, and this is in answers to Interrogatory Number 31.

She was paid $50 according to your answer for something. Do you know who she is?

A. Don't know her and don't recall why she was paid.

Q. Do you know who we can consult in your organization who would know why she was paid and who she is?

A. You have the names.

Q. Well, it would help if --

A. Well, I don't know her and I have never heard of her.

Q. Who in your organization would be in a position to issue a check for $50 for somebody?

A. I probably would have had to approve it. But whoever would have had to come to me and asked my approval -- well, not necessarily.

A $50 expense could have been authorized by Joe Spear or Mr. Obert. I don't know who authorized it. I don't remember authorizing it.

Q. Are there any people besides yourself and Mr. Obert and Mr. Spear who could have authorized questions?

A. Yes, McGaw but McGaw didn't work on this story here.

But they could have called him and gotten their authorization. It is possible he could have authorized it or Bill Adkins or J. J. Arms.

Q. Bill Adkins, would you please identify him for the sake of the record?

A. Bill Adkins was, I think, the president of the defunct company.

Q. At the time or before it was defunct, what was Mr. Adkins' function?

A. The function of a president.

Q. What are the functions of a president in this particular organization?

MR. BRANSON: Objection.

Why don't you limit the question as to whether Mr. Adkins had any editorial role in putting out these two articles. I think that would speed things up considerably.

BY MR. LEE:

Q. Well, the question was during this period in which the article was being prepared, what was Mr. Adkins' function.

You said the functions of a president, but that is not clear since there are many functions a president can perform.

A. I think he performed all of them.

Q. What?

A. Functions of a president.

Q. What do you consider the functions of a president?

A. It is your circle.

Q. You are saying the functions of a president. That does not answer the question.

A. Then call Mr. Adkins and ask him what his functions are.

Q. You must have had some knowledge of what he was doing.

A. He sure seemed to be functioning like a president to me.

MR. BRANSON: All you have to ask him is whether he had any editorial function with relation to those articles.

Mr. Adkins may have licked stamps. Who cares? It has nothing to do with this case.

MR. LEE: Rule 26 be of the Federal Rules of Civil Procedure say that not every question has to lead immediately to a relevant answer.

MR. BRANSON: I am jsut trying to help you.

MR. LEE: If Mr. Anderson can be more helpful --

THE WITNESS: Ask a question. I will be as specific as I can.

BY MR. LEE:

Q. I said what functions did Mr. Adkins perform and you said in a very vague way, the functions of a president.

MR. BRANSON: The question was asked and answered. I am trying to be helpful to speed things up.

BY MR. LEE:

Q. In terms of these articles, as I said before, during this period of '80 and '81, assuming the articles took a number of months to prepare, did Mr. Adkins have any role, whatsoever, in the preparation of or the editorial preparation of those articles?

A. He did not.

Q. Did Mr. Adkins represent you at all in Texas, in that you were personally here, I presume, and Mr. Adkins was located in Texas -- did he represent you at all in your functions as editor?

A. No, I wasn't editor. Bill McGaw was editor.

Q. You said you had editorial capacities.

You are saying that you had no editorial function -- carried out no editorial functions in the Magazine?

A. No. I didn't say that. I said I was not the editor, that Bill McGraw was the editor and he would have been the one in El Paso, directly under me.

Q. When did Mr. McGaw, if ever, cease to be the editor of the Magazine?

A. After the publication of this article or these articles that you are talking about.

Q. Bernie Springsteel and persons he retained are mentioned in the answers to interrogatories as having had some function in relation to the publication of these articles.

Would you please tell me who Mr. Springsteel is?

A. He was the art director.

Q. Did you know Mr. Springsteel prior to his becoming art director of the Investigator Magazine?

A. No. I think Mr. McGaw chose him.

Q. Did you ever meet Mr. Springsteel?

A. Yes.

Q. When did you first meet him?

A. After he had been employed by Mr. McGaw.

Q. Where was Mr. Springsteel located?

A. New York City.

Q. Did he ever come to Washington during the period -- let me change the question.

Did he ever come to Washington and see you or any of your agents or employees during the period that these articles were being prepared?

A. Not that I recall, and I'm quite sure that he did not.

Q. Did you carry on any sort of communication with Mr. Springsteel?

A. Constant communication.

Q. Do you recall any specific communications with Mr. Springsteel about the article or about Mr. Carto?

A. No.

Q. Mr. Springsteel was the first art editor. Therefore, he was, I presume, a man with the initial responsibility for selecting the artwork for the articles about Mr. Carto and Mr. Yockey; is that correct?

A. Total responsibility.

Q. Were suggestions made by you to Mr. Springsteel as to what art should be included with these articles?

A. Only in a general way.

I would have suggested, probably, that he get the pictures of Mr. Yockey and Mr. Carto.

Q. When you said you probably would have or you generally would, can you be more specific?

Can you say I did suggest this or I did veto that or anything like that?

A. No.

Q. When do you recall first seeing the illustrations to the article, assuming you ever saw them before they were published?

A. To the best of my recollection, I saw them after it was all ready to go.

Q. Who would have conferred with Mr. Springsteel about what portions of the article should appear in the illustration form?

A. The man who employed him, Bill McGaw, would have had that responsibility.

Whether he carried out that responsibility, I don't know. We did fire him because he had not carried out his responsibil-

ities, so I am not prepared to say whether he did in this instance or not.

Q. Do you know if Mr. Bermant had any contact with Mr. Springsteel or people selected by Mr. Springsteel?

A. To the best of my recollection he did.

Q. Can you describe anything of which you have personal knowledge about those communications between Mr. Bermant or Mr. Springsteel or Mr. Springsteel's people in New York?

A. No.

Q. Do you know anything about Mr. Springsteel's background or qualifications for the work that he was doing for the Investigator?

A. Not that I now recall. I am sure Mr. McGaw would have given me his background at some point.

Q. I gather from the form of the answer in the interrogatories that you would have no knowledge of who was retained by Mr. Springsteel.

A. No knowledge as to who he hired. They would have had no powers of decision anyhow.

Q. Your interrogatories also name, I think, finally at the end of the list, two sources whose identity is not revealed because of the confidentiality agreement.

Do you have any personal knowledge of those sources or the confidentiality agreement referred to?

A. I have no knowledge of them.

Q. Do you know who does have knowledge of them or who dealt with them?

A. No, I don't. I didn't even know that there were two confidential sources.

Q. Aside from what you have already said about Mr. Bermant who wrote the article about Mr. Carto, apparently, do you have any particular knowledge of his background, training or personal history which would have given you confidence in his ability to write an article which was true and accurate?

A. Yes, he worked for me as an intern.

Q. Were there any particular observations of Mr. Bermant or his abilities or his background which you made which led you to believe that he could be entrusted to accurately --

A. I can't say specifically, but I was impressed with his work. So was his immediate supervisor, Joe Spear.

Q. How about Mr. Obert, who wrote the other article?

A. Mr. Obert was one of Washington's most prominent writers, a man of such repute that I wouldn't have considered challenging his credentials.

Q. Do you know anything about his educational background?

A. No, he would know better than I would.

Q. But I am asking these questions now for the purpose of finding out what you as the publisher knew about the people which you entrusted to write the articles which you published.

A. I knew he was one of the most ten celebrated journalists in Washington. It was adequate for me.

Q. Please name people, if there were any, who were contacted, to your personal knowedge, in an effort to verify information which appeared in the articles which was supplied by other sources.

A. That would have been Mr. Bermant's responsibility, Joe Spear possibly supervised it.

Q. You have no personal knowledge of any efforts made to verify --

A. Only that we insisted that everything be double-checked and that I was assured by Mr. Bermant, and as I recall, Mr. Spear, that the article had been carefully verified and we had government documents to back up everything.

Q. Did you see the documents or were you simply relying on what they told you?

A. They had them in my presence, but I didn't go through them, no. I may have looked at one or two of them, but I didn't take the time to go through them.

I wouldn't need reporters if I had to do their work for them.

Q. I believe if you look at Interrogatory Number 28, there is an implication there that you had some personal knowledge of efforts to verify -- let me see here.

MR. BRANSON: Well, his answer to your question is that he knows Mr. Spear and Mr. Bermant did that.

I think that the answer to the interrogatory says the same thing.

THE WITNESS: I already said that I insisted upon their documenting everything in there and they assured me that they had done so, and they showed me the documents. But I didn't review the documents completely. I didn't have the time. That's why they were employed. That was their job.

BY MR. LEE:

Q. At the time of the article's preparation, did you have in your possession or control, or did you have access to, any materials which were supplied by persons who had ever worked for Liberty Lobby?

A. I never did, no.

Q. Did any people that you know of who were working for you or for the Investigator Magazine have any access to or possession of materials which were supplied by persons who had worked for Liberty Lobby?

A. I had the impression that they had information from people who worked for Liberty Lobby, both present and past.

Q. Well, in order to clarify the situation, I need to go back to the fact that when you worked with Mr. Pearson, -- I have some documents which you produced which show a number of columns which Mr. Pearson and yourself wrote in a much earlier period about Mr. Carto and about Liberty Lobby.

Presumably, Mr. Pearson had in his possession, at one time, materials which were purported to have been taken from Liberty Lobby's office, purportedly written by Mr. Carto, something of that kind.

MR. BRANSON: Why do you say "presumably"?

MR. LEE: Because I don't have anything in front of me to prove it.

THE WITNESS: Neither do I.

BY MR. LEE:

Q. You do recall, do you not, that Mr. Pearson published some columns relating to Mr. Carto and Liberty Lobby?

A. Yes, I do remember that.

Q. Do you remember that those articles referred to letters

or other documents which were purported to have been written by Mr. Carto and taken from his office?

A. No, I don't have any memory of that.

Q. Do you have any materials in your possession now, or did you during 1980 or 1981, which purported to have been taken from Liberty Lobby or Mr. Carto's office?

A. Nothing in my possession.

Q. Let me ask you, in the possession of any of your reporters or employees?

A. I don't know what they possess.

Q. What became, if you know, of the files which Mr. Pearson had which were supposed to have contained documents taken from Liberty Lobby?

MR. BRANSON: How do you know that he had them?

MR. LEE: We can only establish by going through another procedure, but the claim made by Mr. Pearson was that documents were given to him by an employee of Liberty Lobby.

I believe the episode is referred to in the article which we will cover a little later.

I am simply trying to find out whether or not Mr. Anderson, whether in his personal possession or whether in the possession of his corporation --

THE WITNESS: I have answered the question. I don't have any possession of the documents.

BY MR. LEE:

Q. Does that mean that the documents are not present within the premises controlled by you?

A. Yes, not that I know of. If some employee has possession of them, I am not aware of it.

Q. Do you know what became of the items which were supposed to have been given the to Mr. Pearson --

A. I have already testified that I didn't even know that he had gotten such items. So since I didn't know that he hadn't gotten them, I wouldn't know what he did with what he didn't get.

Q. In the articles there is an allegation that a person named Sara Jobe took files from Liberty Lobby and game them to you.

Is that a fact?

A. I have no memory of it.

Q. You don't -- do you know where the files are which Sara Jobe is supposed to have given to you, according to your article but which you don't recall?

A. No, I don't recall what I don't recall. I cannot therefore recall what I can't recall.

Does that help you?

MR. BRANSON: Did you take the deposition of Mrs. Jobe, by the way --

MR. LEE: Off the record.

(A short recess was taken).

BY MR. LEE:

Q. Now that we have taken a break, I will read into the record a couple of citations which show that an attorney is not, according to these authorities, supposed to instruct his client not to answer questions, but rather to permit him to answer under objection.

Shapiro versus Freeman 38 FRD 308; Braziller versus Lind, 32 FRD 367; Ralston Purina Company versus McFarland 550 Fed 2nd, 967.

BY MR. LEE:

Q. To your knowledge, was there any written communication between you, or anybody employed by you, and anybody at all regarding these articles?

A. Not that I recall.

Q. You were answering the questions about verification of the information in these articles in terms of general practice which you follow, I believe.

A. We have strict rules.

Q. All right. Would you please tell me what your rules are and in what form they are preserved, if there is any form in which they are preserved, in writing for example?

A. No, but any reporter -- I don't think we have ever put them in writing, but any reporter of mine can testify as to what the rules are because we emphasize them on a regular basis.

Every fact must be checked out. It must be true. It must be verified since truth is not always possible to identify but we verify it by more than one source.

These sources must be separate sources. It is almost impossible for two separate people to dream up the same lie. We rely heavily on government documents.

The government is not the source of all truth, but its documents, as you as a libel lawyer know, are privileged. So we feel safer when we are quoting government documents.

But even though, as in these articles, we relied entirely on government documents, we are not satisfied that the government has the correct information.

So my instructions would have been, normally, to verify everything in the government document from other sources.

Q. These principles, then, is it true to say, would have been imparted to Mr. Bermant?

A. Absolutely.

Q. And to Mr. Obert?

A. Less to him. He was, I think, more a rewrite man than a researcher.

Q. Do you know upon which government documents the article about Mr. Carto is based?

A. To the best of my recollection, they were based on FBI files but there may have been other government documents.

Q. Did anybody ever object to the publication of the article about Mr. Carto in the Investigator Magazine, to your recollection or knowledge?

A. I think you did but this would have been after it had already appeared.

Q. Did anybody -- prior to that, did anybody voice any objection to you about the publication of either of the articles?

A. Not that I recall, no.

Q. Did anybody ever suggest to you, prior to publication, and not counting the objection which I voiced on behalf of my clients, but did anybody ever suggest to you that any portion of this article should be changed because it was not true or because it might be libelous?

A. I am positive that didn't occur.

Q. Did you ever suggest to anybody that any amount of money -- any particular sum of money be paid to any individual who gave information upon which this article was based?

A. I have a policy of not paying informants. I have testifed under oath, and will be glad to do so again, that I have not ever paid money to an informant unless the informant were a professional newsman, who was doing a professional job.

Q. I suppose that Mr. Eringer, then, who was mentioned earlier, and who was paid $250, was a professional news man doing his professional job?

A. Right.

Q. By the way, do you know what was paid to the authors of the articles?

A. No.

Q. Did you recommend that any particular amount be paid to --

A. My recollection is that both of them were on salary so I don't think they would have been paid anything above and beyond their salary.

Q. Well, I asked if you recommended to anyone at any time, whether a particular payment be made to anybody in relation to these articles, not whether they were paid but whether you recommended personally --

A. No.

Almost certainly Mr. Eringer's claim or entitlement was brought up by someone else. I don't think the approach was made to me. I don't even remember it.

Q. And you did not suggest, then, according to your testimony, that any particular amount be paid to Mr. Bermant?

A. I have already said that.

Q. I believe you said they were paid as salary employees. I was asking if you suggested they be paid anything over and above their salaries?

A. No, we were very tight.

Q. To your knowledge, was any information supplied regarding Liberty Lobby or Mr. Carto or the Spotlight Newspaper to you or any of your people -- any of your employees or agents, prior to the publication of the article which was not used in the article?

A. Almost certainly it was. The article couldn't begin to

summarize all the information that I'm told was made available to us.

Q. Well, did you personally recommend that anything be left out, if you can recall specifically --

A. I saw only the final draft. I did not participate in the preparation of that draft.

Q. After your viewing of the draft and prior to the actual printing of the article, do you recall any other particular viewings which you had of the manuscript in other forms or was that the only time that you recall having seen?

A. The only ones I would recall would have been the final draft and the final article, and then the page proof after it was set in type.

Q. Mr. Anderson, I would like to show you a couple of documents which were produced in your response to our request for production of documents.

Incidentally, the number at the top was put on by an assistant of mine, so that the circled number has no part in the document itself.

Let me show you all three of these, or four, and then we'll ask that they be marked for identification.

As you hand each one back to me, we will have it marked so we all know what we are talking about.

THE WITNESS: I have seen them. Do you have some questions about it?

MR. LEE: Yes but I would like them marked first.

(Whereupon, the above-mentioned documents were marked as Plaintiff's Deposition Exhibit Nos. 1 thru 7 for Identification, and were retained by counsel).

BY MR. LEE:

Q. Before we go ahead, I would like to ask whether you know the name Vincent Drosdick.

A. I never heard of him.

Q. As I said a minute ago, the numbers which have been written here in the circle are not part of the original documents and don't really have any reference to their chronological order.

All of these appear to me, just for purposes of introduction,

to be drafts of one description or another of the articles upon which this lawsuit is brought.

So I wonder -- I would like, if you can tell me, when I pass these to you, If you can shed any light of any description, on what stage of the article's preparation this manuscript represents.

A. I cannot. I see thousands of documents like this every year. I cannot recall it specifically.

Q. The document to which Mr. Anderson just referred was the one marked Plaintiff's Deposition Exhibit No. 1. It is headed Willis Carto: Patriot or Fascist? It has the name of Mr. John C. Obert at the top right.

The item marked Exhibit No. 2 is headed Francis Parker Yockey, by Charles Bermant.

The first line reads: "Had he channeled his prolific intelligence toward a cause other than. . .", et cetera.

Let me show this to you, and I am asking if you have ever seen that or if you can cast any light --

A. I cannot. I have examined, incidentally, all of them and none of them particularly register with me.

I think it is entirely possible that I could have seen all of them but I see so many manuscripts and stories that I would not be able to separate it from the jumble.

Q. The Exhibit No. 1, which you looked at originally, contains what appears to be a telephone number written in the margin but not clearly reproduced.

On the chance that you know what that number is, I would ask you to tell me.

A. No. Maybe somebody was placing a bet that day.

Q. Also in that -- well, we could have trouble here -- you say you don't have a specific recollection of any of these?

A. No, I don't.

Q. And you have inspected each one.

A. So right.

Q. So you have no specific recollection?

A. It is likely that I saw them, but I have no recollection of them.

Q. Can you say without going through here page by page, whether or not you have written anything on any of these documents.

If you are not sure, then I think you better look through each one page by page which you could probably do very rapidly and tell me whether or not you see your own handwriting. In the process, would you tell me whether you can identify any of the handwriting which you do see there?

A. I don't see my handwriting and I can't identify any of the handwriting.

If it didn't appear on the first couple of pages it is unlikely to appear anywhere else.

Q. Mr. Anderson is now looking at Exhibit 1.

A. None of this looks like my work.

Q. And you cannot give an indication of whose work it is?

A. No.

Q. Let me ask you the same thing about Exhibit 2, please.

A. Same. I don't see any of my work here; nothing that looks familiar.

Q. If you would, please, just take the whole stack comprising of Exhibits 3, 4, 5, 6, and 7, and make the same inspection and give me answers to the same questions.

A. This looks like the one I already looked at.

Q. I don't believe so. It is just similar. You have seen Exhibits 1 and 2, and that is Exhibit 3.

A. This looks like the same exhibit. But if it is not, I have the same response to it. I have a separate page 30 which, I suppose, is not a separate exhibit but a piece of another exhibit.

I don't see anything on here which would indentify this with me. These look like exhibits. I don't think this has anything to do with me. Nor this one. It doesn't look at all familiar to me.

I see none of my markings on it, nor this separate piece of paper which seems like a separate thing. It does not look like anything that I wrote or edited.

Q. All right. As long as we are on the subject of documents, I have a few more here which were produced by your attorney and I would like to ask you if you have any knowledge of those.

Let me show you one which is captioned Sherwood Ross Associates, Media Consultants. The title is for release August 31, 1981.

I would just like you to see it and then we'll have it marked for identification.

A. No, it doesn't look like anything that I have seen.

Q. Have you ever heard of Sherwood Ross Associates?

A. Yes.

Q. Who are they, please?

A. They handle public relations for the Magazine.

Q. You say you have no recollection of seeing this release.

A. No recollection.

Q. Do you know what it is in the sense for what purpose it was produced?

A. No, I didn't take the time to read it.

Q. Would you like to look at it more closely?

A. Well I can tell you if he put it out, it was for the purpose of getting publicity. That was his job, anyhow.

Maybe he was just doing it for his amusement, but I doubt it.

Q. Do you personally retain Sherwood Ross Associates?

A. No.

Q. Who does --

A. No one does.

Q. What is his business relationship, if any, with you or with Jack Anderson Enterprises?

A. None.

Q. What is the relationship of Sherwood Ross Associates, if any, with the Investigator or what was the Investigator or the Investigator Publishing Company?

A. He was employed as a public relations firm.

Q. By whom?

A. Whom you just asked.

Q. I asked you about two different places. The Investigator and the Investigator Publishing Company.

A. They are identical as far as I know. I don't know that they are two separate entities.

Q. Who employed them for the Investigator Publishing Company, to your knowledge?

A. I would imagine Bill Adkins did.

Q. Had you ever dealt with them previously?

A. No.

Q. Do you know how Mr. Adkins happened to select this particular firm?

A. No, I have a recollecton that Sherwood Ross applied.

Q. Do you know whether Sherwood Ross ever issued any other releases or prepared any releases of this type about other stories which appeared --

A. I don't know if he even released that.

Q. Do you know if he ever prepared any --

A. I know he was assigned to prepare. What he actually did, I don't know, and I don't see anything in advance.

Q. Do you know what he was assigned to prepare in the way of --

A. He wasn't assigned to prepare anything specific. He was just assigned to prepare for the Magazine.

Q. I am trying to find out whether this is the only thing which Sherwood Ross Associates ever prepared.

A. Then you better ask him.

Q. But you, as the publisher, did not know what he did or what he has done?

A. No, he was just hired to publicize the Magazine.

MR. LEE: Please mark that as an exhibit.

(Whereupon, the above-mentioned document was marked Plaintiff's Exhibit No. 8 for Identification, and was retained by counsel).

BY MR. LEE:

Q. Here is a letter, dated August 28, 1981, addressed to Mr. Jack Anderson. It was written by me.

I would like to pass this over to you, Mr. Anderson, and show it to you and your counsel.

Do you recognize ever having seen the letter before?

A. No. I remember that you had sent me a letter but I get 200 of them a day and I can't really pick this out.

Q. Could you look at the last page and tell me whether or not the person who signed there is someone who is employed by --

A. I have already testified that Opal works for me and she signed it.

Q. Were you aware at any time about the contents of the letter?

A. She might have told me about it. She might have shown me the letter. I was aware that you had complained after the Magazine had already gone out and it was too late to make any changes.

My recollection is that she did tell me that you had a complaint.

Q. As I said, this letter was written and hand delivered on August 28. The Magazine was dated October 21.

Just to fill in for your information, it was my understanding at that time, and this is what I am going to ask you now, it was my understanding at the time that what I had in my hands was simply a copy of some pages from the Magazine which had not yet been issued publicly, and that was the reason for writing the letter. Of course, I could read it. It would be fairer to read rather than summarize.

MR. BRANSON: Please don't.

MR. LEE: The letter complains about the contents of the article.

THE WITNESS: There is no way that you could have gotten any part of the Magazine before it was published so I have to assume that you must have gotten any pages that you got, afterwards.

MR. LEE: It certainly was in print, yes.

THE WITNESS: In any case, the procedures would be, since it was not my story, the procedure would have been to give your letter to the reporter who handled the story.

Q. Is that what was done?

A. I don't know. That would have been the procedure. I would have been advised.

Whether I was shown the letter or not, I can't recall.

Q. Was any effort made to inhibit or stop the circulation of the Magazine following --

A. We had no power to stop or inhibit the sale of the Magazine.

Q. At what stage was the Magazine on August 28, 1981 at?

A. Whatever stage it was, it would have been -- once it is out of our hands, we had no power of the circulation. It was handled by the Hearst Corporation.

Q. What is the Hearst Corporation in that sense?

A. Distributor.

Q. Is it true to say, then, that the Magazine having been prepared was given to the printer. From the printer, where did it go then?

A. I don't know. Mr. Adkins would be the best source on that. It was his responsibility.

Q. Later, and I don't believe I have a copy of it with me, I think around September 10, I wrote asking that you publish a retraction or correction of the untruths in the particular article in the next issue.

Did you ever respond to that communication?

A. I think I asked the reporter whether there were any untruths, as you call them, and he said there were none. He said everything we reported was true.

Q. So was there any effort made -- by effort, was there -- well, was there any effort to publish any sort of response at all to Liberty Lobby's complaints in any subsequent issue?

A. We don't correct truths.

Q. Of course, that is what this lawsuit is about.

A. We'll be happy to put our record for telling the truth up against Liberty Lobby's and the Spotlight Magazine, before any impartial judge anywhere, and put up any amount of money as to who will come out ahead.

Q. That's not the purpose of the lawsuit.

A. I thought you said that was.

Q. I think we will be able to show that there are a number of completely false statements in the article.

In fact, we can go through the article in a moment.

A. The day that you can prove that we don't tell the truth, that we have as bad a reputation as you, I will resign and go out of business.

Q. Well, as enjoyable as this is, I will not get in a debate about that.

A. I will advise you not to. You will lose.

Q. No, I don't think so, but I won't get into it.

MR. LEE: Let's have this marked.

(Whereupon, the above-mentioned document was marked Plaintiff's Exhibit No. 9 for Identification, and was retained by counsel.)

BY MR. LEE:

Q. On this document, and again, you can ignore the number of the upper right corner, this is a single space which begins, "I refer to Imperium regularly."

Have you ever seen that?

A. No, it doesn't look familiar.

Q. Take your time to look at it.

A. I am. I don't recall ever seeing it. I have never seen it.

Q. Do you know who prepared it?

A. Obviously, I don't know who prepared something I have never seen.

Q. Not necessarily. If this is a person who uses your typewriter, or something, you might recognize something.

A. It doesn't look like anything I have ever seen. It doesn't like look like the style of anyone I have ever employed.

MR. LEE: Would you mark that please?

THE WITNESS: I don't know of anyone on my staff who writes that way. They have all learned to capitalize.

(Whereupon, the above-mentioned document was marked Plaintiff's Exhibit No. 10 for Identification, and was retained by counsel.)

BY MR. LEE:

Q. I hand you another document which appears to be -- I believe these two pages probably went together. I am not sure. I will hand them to you together.

Tell me whether or not you recognize it, whether you know who wrote it, or whether you can shed any light on the contents or its connection with the articles?

A. No. I don't recall seeing it.

MR. LEE: I think you better mark those separately.

(Whereupon, the above-mentioned document was marked Plaintiff's Exhibit Nos. 11 and 12 for Identification, and were retained by counsel).

BY MR. LEE:

Q. Mr. Anderson, as I look at the contents of the two pages which you just inspected, it reminds me to ask you a question, and just to be sure that I have had an answer, I will ask it.

Did you have any role, whatsoever, that you can recall, in recommending that statements by certain sources, by the sources who were consulted by your reporters and so forth, did you have any role at all in suggesting whether or not certain statements should be used and certain statements should not be used?

A. No role at all.

Q. The next document consists of -- well, technically, it consists of 16 pages because that is what is stapled here but apparently two of them are blank.

It begins with the letter "W." "Wouldn't the lobby have a charter purpose . . ."

Can you tell me who that is or --

A. No, it doesn't look familiar at all.

MR. LEE: I will ask the reporter to mark that, please.

(Whereupon, the above-mentioned document was marked Plaintiff's Exhibit No. 13 for Identification, and was retained by counsel.)

BY MR. LEE:

Q. The next document consists of one page and begins, "Does either Carto or Liberty Lobby favor . . .", and you can ignore the number which is already written there.

I ask you about your recognition of the document or knowledge of who wrote it or where it comes from.

A. No, I haven't the slightest idea.

MR. LEE: Please mark that.

(Whereupon, the above-mentioned document was marked Plaintiff's Exhibit No. 14 for Identification, and was retained by counsel).

BY MR. LEE:

Q. I just have two more. One begins with the word Hansen, and I will hand that to you. It is a single page and I ask you if you can identify it.

A. No. Most of this looks like it came from the same typewriter, none of which is familiar to me.

MR. LEE: Well, I got them by filing a document in court asking for you to produce documents related to the article, so I don't know where they came from, either.

THE WITNESS: That was handled by my staff. My staff handled the article and they handled the interrogatory.

If they provided it, I am sure it came from the Magazine's files.

BY MR. LEE:

Q. Could you tell me the individuals on your staff who probably selected these documents or who got them out and produced them?

A. No, I would assume Charles Bermant. It was his story. It would be his responsibility.

MR. LEE: Now if you could mark that please.

(Whereupon, the above-mentioned document was marked Plaintiff's Exhibit No. 15 for Identification, and was retained by counsel).

THE WITNESS: We just asked him to cooperate fully.

BY MR. LEE:

Q. The last one of this set is headed United Congressional Appeal.

I hand you that one page and ask you to look at it and answer the same inquiry.

A. No, I don't know anything about it.

(Whereupon, the above-mentioned document was marked Plaintiff's Exhibit No. 16 for Identification, and was retained by counsel).

BY MR. LEE:

Q. Are any memoranda ever written within your organization relating to articles which are in preparation?

A. Not customarily. But I am sure it's happened. It wouldn't be normal.

Q. What about in your communications with the Investigator staff in Texas; how did you normally keep in touch with them?

A. By telephone.

Q. Did you, at any time that you can recall, write any letters or send any written memoranda to anybody in Texas regarding the articles we are talking about?

A. Not that I would recall, though I would want to amend one statement that I remember giving you earlier.

You raised a question about whether anyone there may have objected to the article. To the best of my recollection, I had a falling out with the editor, Bill McGaw, at which point he began to object to everything.

He objected to every article that we wrote, so I think it is entirely possible that he might have objected to this one, too. He objected to every article.

Q. Did he say any grounds for his objections?

A. I don't even remember that he objected, but I think it is entirely likely that he would have, because he was objecting to everything.

He was complaining to the president of the organization and to anyone who would listen, that everything we were doing in Washington was wrong and was going to cause trouble, and wasn't good journalism and any charge he could think up.

So I think it is possible that he might have. Whether it started before this article -- I don't think it would have, but probably after the article appeared he would have objected to everything in the Magazine.

I think it's very likely that he would have objected to this one as well as the others.

Q. Do you recall ever explaining to anybody, Mr. McGaw or anybody else, why you felt these articles, the two we are talking about here this afternoon, should be published in the Investigator Magazine?

A. I wouldn't feel -- at the time when our relations were amicable if he had asked about it, I would have given him an explanation.

Afterwards, I wouldn't have felt under any obligation to give him an explanation. But the answer to your question is I don't recall.

Q. Do you recall ever suggesting to anyone that there might be some favorable reception for these articles on behalf of any particular professional group or any other group if you were to publish them in the Investigator Magazine?

A. No.

What group, to be more specific?

Q. Any group. You would recall if there were any groups. I said any professional group or any other group.

A. No.

Q. In other words, it is conceivable - - never mind, I would just be filling up space if I talk.

Q. Have you ever heard of or met any person named David McGaw?

A. The name doesn't mean anything.

Q. How about Louis Brandon?

A. Again, the name has no meaning to me.

Q. You mentioned certain standards or rules which you have told your employees, if I may refer to the people who generally work for you as employees, whether or not they are specifically salaried, for ensuring the veracity of the things that you publish.

Do you know if the people who were at that time, at the time of the preparation of these articles, employed by the Investigator Magazine, were instructed to use these same principles?

A. Yes, I was insisting on them and this was the source of my differences with Mr. McGaw. He was not checking stories out properly.

Q. You've talked about reliability of documents and reliability of sources and said, for example, that you rely when possible on government documents.

Can you give some indication as to how you would relate - - I'm sorry, how you would rate the reliability of a source or a document?

In other words, in your experience you must have arrived at some subjective rules which you use to determine whether or

not you believe somebody when he tells you something or whether or not you would believe --

A. We don't believe anyone. We have to double check everything. All I said to you was that we have the right, under the libel laws to publish a government document, to publish its contents.

What I said to you was, even though we can do that and it is libel-proof, because it is privileged, we still insist on checking out everything in that government document to determine whether it is true.

I know that the reporters were instructed to call Yockey -- even though dead, to call his family; to talk to relatives, any lawyers that he could find, and that every effort was made to get a hold of Mr. Carto and people who were associated with him; people who would know him.

Even though we had documents we could rely on and documents that were privileged, we feel it our journalistic responsibility to go beyond the privileged documents which can be published under the laws and determine whether those documents are true or not.

Q. Is it true to say, then, that once you have heard the same story about the same fact from two different sources, that you then consider that it is fit to publish it?

A. Not necessarily. The two sources may have gotten their information from the same source. We would have to be satisfied that the information came from two completely separate sources.

Q. Well, is it your testimony, then, that you never publish a factual allegation without having two separate sources?

A. It's my testimony that those are the guidelines and the instructions given to my staff.

Q. You may have answered this question in another form in your interrogatory answers, but I would like to ask you, who had the final say on whether the articles, which we are referring to here, should be published?

A. I had the final say.

Q. Who had the final responsibility in the case of these articles, for the accuracy of the articles?

A. I have to rely upon the accuracy of my reporters. As I said earlier, if I have to double check everything in those stories, then I have no need of reporters and it would be a one-man operation.

Q. About these principles which your reporters are supposed to follow in terms of verification and double checking sources and so forth, how are you assured that your principles are being adhered to by these reporters?

In other words, beyond saying this is what you should do, do you have any method of determining whether or not things are being done right?

A. They are supposed to be questioned by editors as to all the facts.

Q. Who decided that the two articles should be printed together under a single heading?

A. Very likely, Mr. Springsteel.

Q. Why would he make a decision of that kind?

A. He was the art director and made the layout.

Q. It is true that the articles were always, as long as they were separate articles -- was it always assumed during editorial discussions that they would be published together, if not necessarily in the exact form, they would be published as a single package?

A. I don't remember the evolution of the final product.

Q. Do you recall whether or not, and if you do, please tell me, there were any other articles on hand which could have been published in the Investigator Magazine during the period of its existence which were not published?

I don't need to know what they were, but I want to know did you have an oversupply of articles?

A. A large oversupply.

Q. So there was some selective process going on, is it true, then, in the particular articles about Mr. Carto and about --

A. A decision was made to use it and I would have made the final decision.

Q. Do you recall why you decided to use those articles as opposed to --

A. I have already answered that, because of my news judgment.

Q. Can you go into some more detail about that? I am not asking you to repeat your answer, but I am asking you to explain, why, in your judgment, these articles were more significant or more publishable at that time than the others?

A. I thought that they would be of greater interest to a wider number of readers than any other articles in my possession.

Q. Why did you feel that an article about Mr. Yockey would be of wide-interest?

A. Adolf Hitler made a lot of news and I thought an American Hitler would be, therefore, interesting to people.

MR. LEE: Mr. Anderson has just said -- we were interrupted there for a moment.

BY MR. LEE:

Q. Do you know which government documents were used as a part of the documentation of the article about Mr. Carto?

A. No.

MR. BRANSON: Asked and answered.

THE WITNESS: I have already responded to that.

BY MR. LEE:

Q. Do you know how those government documents to which you referred which were used as the basis for these articles were obtained?

A. No.

Q. What I would like to do next is have you look at a copy of the articles themselves, and I would like to go over the headlines, the contents of the articles, and find out which portions you, yourself, wrote and what light you can shed on the contents.

A. I can tell you now that I wouldn't be able to recall.

I remember, vaguely, that I wrote the introduction or rewrote it. I don't think I wrote it from the original. I think I had some material in front of me. I didn't like the way it had been written and rewrote it.

To the best of my recollection, on the two articles themselves, after they had been rewritten, not by me, I just merely edited them. This is something I do every day.

For me to go back and remember what specific word I put into an article a year ago would be absolutely impossible. There is no possible way that you could get me to remember that because it's just -- it is part of my daily existence.

I just don't have a memory that is that sharp. So it would be a waste of your time. But if you wish to do it, I will be glad to go over it.

Q. Well, without opening up the -- without taking your time to go through the answers to interrogatories, if my recollection serves me, it stated that your particular contribution, as far as writing was concerned, was in the title and in the introductory portion.

You may just have repeated that.

MR. BRANSON: He just said that.

BY MR. LEE:

Q. Can you say for a fact that you did not make any editorial changes in the --

A. No, I can't say that for a fact. My custom would be to go over it and change a word here and there that I didn't like, or question a fact or do what every editor/publisher would do.

Q. Do you have any idea where the manuscripts are which you would have made such changes on in your own hand?

A. I presume they would have been sent to New York and then to the printer. Maybe World Color Press has them. They were never returned to me.

Q. What is World Color Press?

A. The printer.

Q. By the way, Mr. Springsteel, is he an independent businessman of his own or does he work for another organization?

A. An independent businessman, to the best of my knowledge. I didn't hire him. But that is my understanding.

Q. You said, more or less, that nothing would be served by going through the text of the main body of the articles.

A. Right. I don't even recall writing the headlines, but I am told by others that I did. I accept their memory and I am almost positive that even the original -- the introduction would have been based upon -- well, it was based upon -- I had no

independent information. I based it on the information in front of me.

So I was relying, once again, on the reporters who work for us. I would have simply rewritten it in order, probably, to serve as a bridge for the two articles.

That's probably the reason that I did it. But I don't even remember why I did it. Looking at it now, that would be my judgment.

I saw two articles and felt they needed a bridge. So I took material either from the two articles or asked someone else to prepare a bridge which I disliked and then rewrote. It happened one of those two days almost certainly.

The information in the interrogatory is based on other peoples memories rather than mine.

Q. I am not completely sure from your answer whether you recall if anyone else had anything to do with the introductory section here.

A. Well, let me repeat my answer. I had no independent information upon which to base the introduction. So, the reporting would have been done by someone else. It is possible that the original draft was done by someone else.

The people in my office recall that I wrote the final introduction. I accept that. On rereading it, which I have done this morning, for the first time, it does sound a little like my writing and I'm inclined to accept the responsibility for it; that is, for the way it is worded.

I would have submitted it back to the reporters and had them reread it for accuracy to tell me whether they found anything in the rewriting that was inaccurate.

Q. In the first paragraph of that introduction the statement appears, "But a more sinister neo-Nazi cabal, men of influence and cunning, lurk in the shadows."

What particular men were you referring to when you wrote or permitted that sentence to pass?

A. The people who are -- I think it is fairly clear here. The people who are promoting and publishing the Mein Kampf of America.

It is a book called Imperium, a book dedicated to Adolf Hitler, a book that calls for the "Hitlerizing and the Nazification" of the United States.

I consider that to be sinister.

Q. What is the authority for the statement in the second column in the introduction, the next paragraph to the last, in which it is stated, "Francis Parker Yockey died in SS boots"?

A. This would have been provided by the reporters.

I have a vague recollection that they said that they had called the police in San Francisco where he died.

Certainly I would have required them to do that so I think you can almost count on the fact that that's where they got it from.

Q. Do you have any idea what SS boots look like, by the way?

A. No, but I imagine San Francisco police might.

Q. The introductory then states, "It was left for another to pick up the torch and fan it into a prairie fire. His name is Willis Ellison Carto."

What torch are you alleging --

A. I recommend to you the introduction that he wrote of this book, Imperium, which advocates the Nazification of America, and you will find from reading it that it is a glowing tribute, not only to the book, but to Mr. Yockey, and that, indeed, Mr. Carto referred to Mr. Yockey in almost messianic terms.

Q. What is the prairie fire which is now raging which Mr. Carto has fanned up?

A. Where do you find that?

Q. That's in the next to last paragraph and the last paragraph of column two of the introduction. It is on page 20.

A. I'm sure that I was referring at the time, although I can't recall what was going on in my mind a year ago, but I would presume that I was alluding to the fact that Imperium had died a literary death until it was resurrected and publicized and promoted and distributed by Mr. Carto.

Q. Turning to page 21 of the article --

A. This is your last question because I have to leave.

Q. Mr. Anderson, I understood that we had all day today, or all afternoon at any rate. It is now 3:49.

A. I don't know who gave you that understanding. You didn't get it from me. I have radio deadlines and I have to make them.

Q. Well, I have a letter from your attorney, I believe, which stated that we had the dates of the 12th and 13th all day.

A. He's a big corporate lawyer and their days end at quarter 'til four.

Q. Well, this leaves us in the position of having to continue at another time. What time would you be available tomorrow, then?

MR. BRANSON: How much more is there left to do? I don't see that there is very much.

THE WITNESS: I certainly want to cooperate, but I would appreciate, in your return, your expediting it.

MR. LEE: Except for the number of questions that we are going to have to ask the judge to compel answers to, I essentially want simply to go through the article.

THE WITNESS: I have already explained that --

MR. LEE: If you would be willing to stipulate that we could see you in a more distant future, we could move to compel after the resolution of that.

But I don't want to get caught in the position where it is said that we have finished the deposition and I can't get you back.

THE WITNESS: I have already testified here that I have no recollections on what specific additions or editings that I would have made. My memory was even vague on the introduction that I wrote.

You must keep in mind that I write several stories every week -- at least two or three a day.

For me to go back a year and pick out a particular article and recall precisely that it was mine and how much of it was, is almost impossible, particularly when I didn't do the reporting.

If it was a story that I had worked on and reported, then I would have a more -- I would have a clearer recollection of these things.

But I merely threw together a quick editorial bridge of this. It was based on the reporting of other people. All I did was add polish, hopefully, to a rough literary effort on their part.

I was not, in any way, correcting any facts that they had given me. They had orders and have standing orders not to permit the facts to be altered in anyway by any rewrite.

So factually, you would have to question them as to where the information came from.

If you are interested in why I would use a certain verb or a certain adjective, I don't know what it would add to your case because I wouldn't even be sure now why I used it.

I would have to go back a year in memory to tell you why I used an adjective or a verb. The facts I have no responsibility for except to set down strict instructions to my staff on how to -- that they must double check; that they must talk to sources and to tell you that my recollection is that they did this in this case.

I believe they talked to the San Francisco police; they talked to Mr. Carto's organization. They tried to talk to Mr. Carto. They spoke to everyone they could get a hold of: to relatives, friends, associates. That they spent a long time checking out facts that were already available to us in documentary form.

That is essentially my testimony. But which facts and why they used them, this was the responsibility of the reporter.

All I did to their copy was to go over it, which I would normally do, and make any editorial or any language changes that I thought would make it more readable. I don't remember that I made any. So for you to go over it, sentence by sentence, would get you nowhere.

I can tell you right now that I don't remember making any changes. I think it is likely that I did. But if I can't remember making any I am not going to remember which specific ones that I don't remember.

Q. Nevertheless, I do have some more questions, and if you want to leave today we will have to have an understanding that you will be back.

A. I have no objection to coming back if it was useful but I would hope that you wouldn't bring me back just to use up your time and to harass me.

MR. LEE: Of course not.

THE WITNESS: That understood. I see no real reason to come back, but if you can explain to Mr. Branson here a good reason why I should come back, then I'll come back.

MR. LEE: Well, at this point, we have a commitment from Mr. Branson that you were to come back tomorrow to complete the deposition.

So I am asking now if you will both agree that, without any need for explanation, you will return at some mutually convenient future date.

THE WITNESS: If it is productive. If not, it will be very short.

MR. LEE: I don't anticipate that it will take a long time anyway. But I am sure there are questions I have forgotten to ask and also there are some more specifics.

THE WITNESS: If it is relevant, I have no objection to responding. Though, if you wish to submit it again in writing, we will give you a response.

MR. LEE: Will you be willing to stipulate that Mr. Anderson will be appearing.

MR. BRANSON: Under appropriate circumstances at the appropriate time.

MR. LEE: What do you consider the appropriate circumstances?

MR. BRANSON: What all lawyers consider appropriate.

MR. LEE: The deposition is not concluded.

THE WITNESS: You may discover other questions.

MR. LEE: Let me ask you two more short ones so we can get them in our motion to compel.

BY MR. LEE:

Q. When I asked you about your personal history, which I do think we have a right to know, will you tell me in what capacity you worked for the Mormon Church?

MR. BRANSON: Don't answer the question.

THE WITNESS: I have no embarrassment over it but I will always follow the counsel of my attorney.

BY MR. LEE:

Q. I don't believe I asked you about your military career.

Would you be willing to state when you were in the military, which branches and your service?

MR. BRANSON: Don't answer.

THE WITNESS: On the advice of attorney, I will let you appeal to the judge.

MR. LEE: Thank you. Mr. Anderson.

(Whereupon, the instant proceedings were adjourned at approximately 4:00 o'clock, p.m.).

CERTIFICATE OF DEPONENT

I hereby certify that I have read the foregoing Pages 3 through 116 of my deposition testimony taken in this proceeding and with the exception of changes and/or corrections, if any, find them to be a true and correct transcription thereof.

_____

JACK ANDERSON

_____

Date

CERTIFICATE OF NOTARY PUBLIC

Subscribed and sworn to before me this the _____ day of _____, 1982.

_____

NOTARY PUBLIC IN AND FOR

My commission expires:

CERTIFICATE OF NOTARY PUBLIC

I, Patricia N. Locke the officer before whom the foregoing deposition was taken, Pages 3 through 116 do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me and thereafter reduced to typewriting under my supervision; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties of the action in which this deposition was taken, and, further, that I am not a relative or an employee of any attorney or counsel employed by the parties thereto, nor financially nor otherwise interested in the outcome of the action.

PATRICIA N. LOCKE
Notary Public in and
for the District of Columbia

My commission expires:
June 30, 1984.

APPENDIX J
DEPOSITION OF CHARLES BERMANT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC.
and
WILLIS A. CARTO,

Plaintiffs,

v.

JACK ANDERSON, et al.,

Defendants.

Civil Action
No. 81-2240

Washington, D. C.
Friday, August 20, 1982

DEPOSITION OF:

CHARLES BERMANT,

a witness, called for examination by counsel for the Plaintiffs, Liberty Lobby, Inc. and Willis A. Carto, pursuant to notice and agreement of counsel, in the offices of White & Case, Suite 500, 1747 Pennsylvania Avenue, N.W., Washington, D. C. 20006, beginning at approximately 11:55 o'clock, a.m., before PATRICIA N. LOCKE, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

APPEARANCE OF COUNSEL

On behalf of the Plaintiffs:

FLEMING LEE, ESQUIRE
Liberty Lobby, Inc.
300 Independence Avenue, S.E.
Washington, D. C.

On behalf of the Defendants:

DAVID BRANSON, ESQUIRE
White & Case
Suite 500
1747 Pennsylvania Avuenue, N.W.
Washington, D. C. 20006

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PROCEEDINGS

Whereupon,

CHARLES BERMANT

was called as a witness and, having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFFS

BY MR. LEE:

Q. State your name, please.

A. Charles Bermant.

MR. LEE: Mr. Bermant, I just want the record to reflect that I met you prior to beginning here. However, I will introduce myself again.

I am Fleming Lee, attorney for the Plaintiffs in this case. I would like the record to reflect that we are beginning just before noon because of a delay necessitated by a medical appointment.

BY MR. LEE:

Q. Tell me your home address?

A. 5415 Connecticut Avenue

Q. Are you employed at this time?

A. Yes, sir.

Q. By whom?

A. Jack Anderson Enterprises.

Q. What is your business address?

A. 1401 — 16th Street, Northwest.

Q. Where were you born, please?

A. Brooklyn, New York.

Q. Approximately what is your age?

A. Approximately 28 and five months.

Q. I would also like to note on the record that about five minutes ago, I was handed an affidavit prepared and sworn to by you, Mr. Bermant and it contains a considerable amount of information that I was going to obtain through questioning you here at this deposition. Therefore, I am not going to ask you certain questions about your personal history which I would otherwise have to ask you.

I would like to ask, as I glance through the deposition here, how you happened to join Jack Anderson's staff as an intern?

A. There was a friend of mine who I worked with in Espanola, New Mexico, in the years 1977, '78, who had joined Jack Anderson staff in the same way, applied for an internship, was granted an internship and I came east in October or September of 1980. She advised me to apply for the intership and I did so, and I was hired.

Q. What is the definition of an internship in this sense?

A. It is a three-month period where we work primarily on the radio show. An intern usually gets about three or four lead items in the column during that period. No pay is given. It's really a trial period. If, at the end of three months, one's work is judged to be compatible with the Anderson organization, and if there is a vacancy, then that person is added on to staff.

Very few people are added on to staff. There is only one, to my knowledge, who has been on the staff without being an intern first.

Q. In addition to the employment by newspapers and so forth which you list here, have you been employed in any other capacity since high school?

A. A multitude of capacities from dishwasher to census taker. I couldn't begin to name all of them.

Q. Have you ever given a deposition before, by the way?

A. No, sir.

Q. If you should not understand any question I ask you, would you please ask me to clarify it before you answer?

A. Sure.

Q. Have you ever been convicted of a crime?

A. No, sir.

Q. Have you ever been involved, in any way, in a libel suit, a defamation suit before?

A. No.

Q. Let me explain this is a suit based on libel as I am sure you know, alleged libel.

A. No, sir.

Q. What stories did you write for Mr. Anderson's organization up until the time that you started preparing the article which is the subject of this lawsuit?

A. As an intern, I have prepared a number of radio stories. I have all of those stories at home, which is probably a 30 or 40 page book of stories.

I completed several short items for the column having to do with politics and government and feature items for the column. I completed three lead items? Do you want to hear about them?

A. No.

Q. I was generally trying to get an idea of the type of work you did.

Is it true that in connection with that work, you also did investigation and research, as well as writing?

A. Yes, sir.

Q. Did anybody in Mr. Anderson's organization, ever give you anything in writing which prescribed the methods you were to use to assure the accuracy of what was published eventually?

A. Nothing in writing was ever given.

Q. Were you ever given any oral criteria?

A. If I recall, we were given a textbook on investigative reporting and the timing of that was only that the textbook was written by Clark Pollenhoff and it was published that year and we each received a copy.

Q. Anything else?

A. Not that I recall.

Q. In your employment with Mr. Anderson's organization, who was your immediate supervisor in the sense of supervisor as a person to whom you were responsible?

A. The radio editor Howard Rosenberg. He is no longer with the organization.

Q. At which time?

A. When I was an intern.

When I became a staff member, I reported to Joe Spear and Opal Ginn. S P E A R and Opal G I N N.

Q. Who pays you for your work? In other words, who signs the checks?

A. Jack Anderson.

Q. Within that organization, do you have any other duties than the ones you've described?

A. My duties now are vastly different than my duties then.

Q. I see. At the time that the article, which is the subject of this lawsuit, was prepared, you say in your affidavit you were told by Mr. Joe Spear, originally, to begin working on such articles?

A. Yes, sir.

Q. Maybe we should present the article itself for identification. In so doing, I will pass it over to you, Mr. Bermant, and your attorney, and ask you to look through that copy of an article from the Investigator Magazine, dated October 1981.

(Witness reviewing document).

BY MR. LEE:

Q. Is that the article which you wrote as described in your affidavit?

A. Yes, it is.

Q. There are two articles under a single heading there. Did you write both of those articles originally?

A. I did the first draft for both articles.

MR. LEE:

MR. LEE: Let me ask the reporter to mark this for identification, please.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 1, for Identification and was retained by counsel).

BY MR. LEE:

Q. Did you receive any draft of any kind or any notes of any description written by anybody at the time you were told to start preparing these two articles?

A. I received a draft of an article. I don't know what the origin was. I used none of the material that was contained in the draft. It is in the exhibits which you asked for.

Q. There was a -- you say it was a draft of an article?

A. Yes, that I believe was commissioned by the organization from a freelance writer, but I am really not sure of its origin.

Q. Who told you that it was commissioned from a freelance writer?

A. I believe it might have been Joe Spear.

Q. As nearly as you can recall now, would you tell me exactly what Joe Spear said to you, from the beginning, at the time he assigned you to do the work on the articles.

Incidentally, when I use the words "the article" or "the articles", I am referring to the two which have just been marked in the article of October 1981 in the Investigator.

A. I can't recall the exact substance of the conversation, but, to my recollection, he told me that I was to research two articles, both of the articles. One was on Mr. Yockey and one was on Mr. Carto and his activities. I was to get everything I possibly could, put them in two drafts and turn them in by an appointed time which I believe the deadline was then the middle of June 1981.

For source, I was given that draft. I was given a copy of Imperium and I was told to get the rest of the stuff myself.

Q. Did Mr. Spear give any indication of why it had been decided to have articles on these particular subjects?

A. Well, the article on Yockey is really a historical interest piece. We found him sort of a fascinating character and his story had never been written.

The article on Carto was in keeping with, I guess, let me think about that for a second. With the election of Mr. Reagan, the government has taken a conservative bent and we felt Mr. Carto to not be a really conscientious conservative in the Ronald Reagan, William F. Buckley mold, and we wanted to point that out.

Q. What further part, if any, did you have in preparing the articles? If I'm correct now, you have described research which you did and you said you wrote the first draft of the articles.

What further connection, if any, did you have with the articles prior to their publication?

A. Well, I reviewed every subsequent draft. I packaged all the material and mailed it to New York for typesetting. I consulted with the director on the phone. I proofread the articles when they were in Time.

Q. When you say you packaged it, what was in the package, simply the typescript or were there illustrations included or what?

A. To my recollection, the only illustrations I included would be a picture of Yockey acquired from the San Francisco Chronicle, a picture -- a copy of a ten-year old picture of Mr.

Carto, and a couple pictures of the Liberty Lobby building which were never used.

Q. Where did you obtain the pictures of Mr. Carto and the Liberty Lobby building?

A. We took the ones of the Liberty Lobby building ourselves. The picture of Mr. Carto was acquired from Wes McCun on New Jersey Avenue. It was a newspaper picture, so, it would not reproduce. You can't reproduce pictures from another paper, at least not have it look any good.

So, I took it to a place on I Street between 14th and 13th for photo reproduction. They made a copy of a picture, a five by seven, a very grainy picture, and I sent it to the art director.

Q. Do you know who decided that the article should be illustrated with handdrawn pictures?

A. That was the art director's decision.

Q. What was his name?

A. Bernie Springsteel.

Q. Did you ever meet him?

A. Yes.

Q. Where was he located?

A. New York.

Q. Did you see him in New York or somewhere else?

A. I met him on several occasions in New York, three or four or five.

Q. The article, as can be seen from the exhibit, contains several different illustrations. Did you describe to Mr. Springsteel what subjects you thought should be incorporated?

A. It is the art director's prerogative.

Q. Then what exactly did Mr. Springsteel have to go on as a basis for these illustrations?

A. I believe he may have been sent a rough draft prior to the final draft, so, he could read it and instruct -- it was his prerogative. The art director, I guess, he reported to Mr. Anderson and at that time Mr. McGaw was still with the organization. In fact, it was entirely his.

I might hazard a guess as to -- well, no. I guess I can't.

BY MR. LEE:

Q. Who, of your own personal knowledge, would have de-

termined whether or not Mr. Springsteel's idea for illustrations were acceptable to the Investigator Magazine?

A. Mr. Anderson, Mr. McGaw, Mr. Atkins, the president of the company.

Q. Do you know any more specifics than that? In other words, do you know any more specifically with whom Mr. Springsteel communicated about what?

A. No, I don't.

Q. Did you see the illustrations in any form prior to the magazine being -- the article being sent off to be put into print?

A. I was in New York for about a little more than one day for proofreading.

Q. About when was that?

A. That would be the middle of July. It was a Monday and if I saw a calendar, I could probably ascertain.

Q. That's close enough.

Can you tell me when you think the magazine was in the hands of the printer being set and typed and so forth?

A. I believe the beginning of August.

Q. Were you ever aware of any controversy among the people involved in preparing these articles as to whether or not they should be published?

A. I was not aware of it at that time.

Q. In a sense, I will reask the question by saying if you are aware of any discussions, pro and con, which you would not consider controversies, were you aware of such discussions?

A. There was never any doubt in my mind, while I was preparing the articles, that they would be published.

Q. Did you ever have any knowledge that anybody had objected to or otherwise questioned the wisdom of publishing these articles?

A. Not at that time.

Q. At what time would you have had any such awareness?

MR. BRANSON: You can answer that subject to the instruction that any communications that you and I have had about any subject are not to be revealed.

I don't know whether we have -- I don't know whether that tells you not to answer the question or to answer the question.

But any information you have learned from your lawyer is privileged information, and if that is the source of your information, then don't reveal it.

THE WITNESS: That applies.

BY MR. LEE:

Q. That applies?

A. Yes.

Q. In other words, under attorney-client privilege, you are refusing to answer that question?

MR. BRANSON: Yes, I have instructed him not to answer that question and you can confirm that and say you will not answer that question based upon my instruction.

THE WITNESS: All right.

BY MR. LEE:

Q. Did you have a part in the preparation of the introductory section to the articles on Pages 20 and 21 of the magazine?

A. Mr. Anderson used materials supplied by me to write that introduction.

Q. Did you discuss the prospective contents of the introduction with Mr. Anderson?

A. No.

Q. Did you ever speak, personally, with Mr. Anderson about the article prior to its publication?

A. I kept him aware of the developments -- of some developments. I don't recall exactly. I did not have that much personal contact with Mr. Anderson at the time.

Q. Are you aware of any time at which Mr. Anderson had any sort of discussion about these articles with anybody?

A. No.

MR. BRANSON: Other than the ones you have said.

THE WITNESS: Other than the ones with me.

BY MR. LEE:

Q. Do you recall if Mr. Anderson gave specific suggestions to you about what should go into the article or what shouldn't or how it should be written?

A. No.

Q. What other person, if any, ever made any suggestions to you? Maybe I should repeat. Suggested that you should or

should not include some particular piece of information or suggested that you should word something differently; suggested that you do anything which would have varied, perhaps, your own spontaneous writing of the article?

A. It was my responsibility to write the article. I received no suggestion as to what should be included. I received suggestions, say, to contact Mr. McCun for information. I believe that was the only suggestion I received from. I believe, it was Opal Ginn who gave me his name.

Q. Looking at it in a general way, what do you recall about changes made from your draft to the final version by other people who were involved after you submitted your drafts?

A. Clarify that, please.

Q. In other words, I wonder if you can give me, without my having to go through these manuscripts page by page at the moment, if you can tell me whether, if you recall, how the published article differed from the drafts you had written and submitted to the Investigator?

A. I would really have to refer to the draft. I would be happy to point out specific instances. I can't really depend on my memory for that.

Q. Did you have any part in the writing of the headings, in other words, the headlines, the small subheadings within the article as they were published in the magazine?

A. I did not write the headlines. Let me see about subheadings. I may have written some captions and I may have participated in the pull quotes, writing these pull quotes which are actually direct quotes from the text of the article.

Q. Those are the quotes in large dark type within the rest of the article?

A. Right.

Q. Which captions do you think you wrote?

A. Do you want me to go through them?

Q. Yes, if you would, please, and look at each picture and tell me whether or not you wrote the caption and if you didn't, tell me who wrote it, if you know.

A. I can't really remember, but I will say that I don't see a caption there that I could not have written.

Q. Mr. Bermant, you said you first heard about this in March 1981?

A. May.

Q. May, 1981?

A. Yes.

MR. BRANSON: He was promoted to full staff in March.

BY MR. LEE:

Q. I have here a letter from J.R. Soriano, Captain, U.S. Navy, addressed to you. It is dated July 20, 1981, and I will now show you that, and Mr. Branson, and we will have that marked as an exhibit by the reporter.

Incidentally, the letter is attached to a fair number of other pages which are not relevant at the moment.

(Witness and counsel reviewing document).

MR. LEE: Let me read the first paragraph and see whether or not you agree that this is an accurate reading.

As I said, this is from J.R. Soriano, Captain of the U.S. Navy, addressed to Mr. Charles Bermant, care of Jack Anderson. "Dear Mr. Bermant, on 14 July 1981, we received a referral of Navy-originated records from the Federal Bureau of Investigation in connection with your 17 April 1980, Freedom of Information Act request about Francis Parker Yockey (deceased)."

Then, apparently, he did enclose here a number of items relating to Francis Parker Yockey. How the date of 17 April, 1980 -- how did that date fit in with what you said about your first having been assigned this in the summer of 1981?

MR. BRANSON: I would like to state that there is no evidence that the Captain in the Navy had the right date for the original request to the FBI.

Indeed, it is 17 April 1980, and he is responding on 20 July, 1981. Mr. Bermant has previously given evidence in the form of his affidavit, that in April 1980, he was in Albuquerque, New Mexico, working as a freelance writer, so I want to reflect that there is no basis that the Captain's date of the FBI, FOIA request is correct.

THE WITNESS: I may have written the article on the 17th of April 1981.

MR. BRANSON: It is not the article but --

THE WITNESS: The request. During the entire month of April 1981, I was at work preparing the first issue of the Investigator. This is the second issue of the Investigator that the articles appear.

BY MR. LEE:

Q. So, are you saying that you --

A. I may have written the request, but I did so at the request of Joe Spear who -- and at that point, the assignment as to who -- the decision as to who to assign these pieces with had not been made. That decision was made in, I believe, early May of 1981.

My bosses were just planning ahead.

Q. Is your answer that you did write it in 1980?

A. No, I could not have written it in '80.

Q. If you will refer to that letter, you will see where I got the idea?

A. I see.

MR. LEE: I would like to have this marked.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 2, for Identification and was retained by counsel).

BY MR. LEE:

Q. Do you know who decided that the two articles should be printed under a single heading?

A. It was probably Jack Anderson.

Q. Were you personally aware of any reason for the decision to publish the two articles with their pages alternating, more or less, through the magazine?

A. That would be the decision of the art director.

Q. Are you aware, specifically, that he made that decision?

A. To the best of my knowledge, he made the decision and it was probably cleared with Jack Anderson.

Q. Did you have an opportunity to discuss the illustrations to the articles with anyone prior to mailing off the materials to be printed?

A. No, I was asked -- part of my job as associate editor was to do any little task that needed to be done. I was asked to try to

secure pictures of Mr. Carto and Mr. Yockey. I was successful with Mr. Yockey. I was unsuccessful with Mr. Carto.

Q. Did you ever see any other pictures of Mr. Carto other than the one you have described already?

A. I do recall that it's very possible that I sent a Xerox copy of a Washington Post article to the art director as well, which contained -- there were several Washington Post articles. They all seemed to have the same picture of Mr. Carto.

Q. About what year was that picture taken as far as you know?

A. I don't know when the picture was taken.

Q. Have you ever seen Mr. Carto in person?

A. No, I haven't.

Q. Was the article, and by that, I mean the whole pair that we're talking about with the introduction, was the article prepared, specifically, for the Investigator Magazine, from the beginning?

A. Yes, it was.

Q. Were you aware of other articles which might have competed for space in the Investigator Magazine during its lifetime, which were being prepared by anyone you knew or which were being discussed?

A. I was not aware of what was going to be prepared. I knew there were several things being prepared. I think the general procedure is to over assign, because you would rather have too much copy than too little.

Q. Tell me what you know about Mr. Obert in his professional capacity and his relationship to the Jack Anderson organization?

A. Mr. Obert was on the staff of Senator McIntyre from New Hampshire, who, I believe, was defeated in 1978, and he was on that staff for many years. He held another government position subsequent to that. I don't know exactly where he worked.

He co-wrote a book with Senator McIntyre, I believe, and it was about the right wing extremism. Mr. Obert is, to my knowledge, an expert on right wing groups and he is, also, one hell of a fine writer.

Q. Well, I was asking about his particular relationship with the Jack Anderson organization and with you, if you know him.

A. I met him for the first time in May or June of 1981. I think he's a longtime acquaintance of the office. I don't know the nature of his acquaintance.

Q. Were you told why your drafts were being given to him?

A. No.

Q. Did you discuss with Mr. Obert anything concerning these articles?

A. I don't recall discussing the substance of the articles. I think that he just took them and rewrote them.

Q. Do you know why his name appeared on one article and yours appeared on the other?

A. That was actually uncertain up to the point of publication. I requested that my name be put on the Liberty Lobby article because it contained more of my original material than the other article.

Q. Was there any reason that your name shouldn't have appeared on both articles?

A. I don't think we, in the organization, in the Investigator, anyway, Jack preferred that no one person write more than one -- have more than one byline.

To my recollection, some articles may have, if one person turned in two articles, the two articles ran in successive issues rather than the same issue.

Q. Did anybody ever discuss with you or instruct you as to the tone that your article should take?

(Off the record discussion).

MR. LEE: Please read that back.

(The reporter read the record as requested).

THE WITNESS: I was not given any instruction. I could use whatever tone I wished.

BY MR. LEE:

Q. Was it ever discussed with you by anybody that the articles would be published in order to have any particular impact on the public or on any particular group?

A. No.

Q. If there are any other people who took part in the articles than the ones you just named, would you please name them now?

A. I would probably have to refer to my affidavit. May I?

Q. Sure.

A. You're saying from an editorial standpoint?

Q. No, took part in the writing?

A. The writing?

Q. Yes.

A. I'm sorry, there is no other person.

Q. In terms of editing, I believe we have that information. Is it in your affidavit as well?

MR. BRANSON: That would be in the answers to interrogatories.

BY MR. LEE:

Q. Did anybody other than you, to your knowledge, do any research or investigation in preparation for the writing of the articles?

A. No.

Q. Did anybody, to your knowledge, other than yourself, make any verification of information which you included in the articles?

A. No.

Q. I'm going to hand you a group of papers which I had copied from the -- papers which were produced by your attorney on behalf of the defendants in this case.

I have a set here, myself, of the same items and I had a copy made for you.

So, if you would please look at this, we will have to take these one at a time and then have each one marked in turn, for identification.

So, if you like, perhaps the best thing for me to do is perhaps start with the one on the top and have you and Mr. Branson and Mr. Apple, if he likes to look at it and then I will ask a question.

The first one is a single sheet of paper having at the top, "Does either Carto or Liberty Lobby favor a repatriation of blacks to Africa". You have that before you?

A. Yes.

MR. LEE: Let me have the reporter mark this.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 3, for Identification and was retained by counsel).

MR. LEE:

Q. Mr. Bermant, this and the other exhibits will be attached to your deposition. It would take forever if we read these out loud.

Can you tell me, however, after glancing through it, whether you have ever seen it before?

A. Yes, I have.

Q. Can you describe for me what it is, please?

A. It is the list of questions I took with me when I interviewed Mr. Bartell in, I believe, June 11, 1981. It is a partial list of the questions. I believe there were a few more pages.

Q. Do you know where the other pages are?

A. They should be in that material that was given to you.

Q. Did anybody, other that you, have any part in formulating these questions?

A. No.

Q. At what time, approximately, did you write this list of questions?

A. At what time?

Q. Not what time of day, but approximately what date did you write these questions?

A. If I'm correct in saying that the 11th of June was the date of the interview, I would say that I began writing the list of questions, assembling the list of questions on Monday of that week.

Q. Going to another one of these items, I have here one which consists of a number of sheets stapled together.

The first page begins with the line, "Wouldn't the Lobby have a charter purpose.", and then it has an X and an A. Do you have that in front of you?

A. Yes.

Q. I don't know how many pages that is. Let's have that marked for indentification.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 4, for Identification and was retained by counsel).

BY MR. LEE:

Q. Have you ever seen this before?

A. Yes, I have.

Q. What is that?

A. A transcript of that interview with Bob Bartell.

Q. Did you record the interview?

A. Yes, I did.

Q. Did Mr. Bartell know you were recording the interview?

A. Yes, he did.

Q. Who typed the transcription?

A. An intern named Eileen O'Conner.

Q. To your knowledge, is this a complete transcript of every word said during the interview?

A. To my knowledge it is. As far as every word goes, I needed the transcript done yesterday when I gave it to her, and I instructed her to not bother -- to go for the substance and not bother transcribing my remarks because I knew what I said and I could determine that from the context and to not worry about typing errors.

Q. What did you then do with this transcript, in terms of your use of it in preparation for writing the article?

A. It was quoted from in the article. I believe every direct quote attributed to Bob Bartell in that article came from this transcript.

Q. Do you recall whether or not you used any information from the transcript without attributing it to Bob Bartell?

A. I don't recall. I would have to look at the article. It is possible that some factual material was used.

Q. We're going to go through the article and you can tell me if you recall.

Presumably, most of what was used here, used in the article from this transcript would be easily identifiable by the attribution?

A. Yes.

Q. Do you recall whether or not you learned anything in particular from your interview with Mr. Bob Bartell which was of use to you in preparing the article?

A. I would have to look at the article.

Q. All right.

A. The one, in fact, that says one fact, ". . . Liberty Lobby's income of four million dollars a year."

Q. The next item I would like to discuss is headed "Bakersfield Californian". The spelling is unusual but that's close enough. "6/11/69". Could you please mark that?

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 5, for Identification and was retained by counsel).

BY MR. LEE:

Q. I would like to point out that everything we're looking at is typewritten, on eight and a half by eleven sheets of paper. Can you tell me anything about this piece of paper?

A. This as well, as to do with this.

(Indicating).

They are one in the same document.

Q. Can you clarify that for me, then, because I don't know what you are referring to.

A. "Statecraft a vicious smear sheet published."

Q. All right. I have that one.

A. That is actually Page 1 of this.

(Indicating).

This was typewritten by me from Wes McCun's files. He does not allow loaner -- the loan of any of his files. I had to leave him a blood deposit for that picture. I just went through his files and typed up any information I felt to be pertinent.

Q. What form, physically, did his files take?

A. They are just, to the best of my recollection, in some kind of file folder or envelope and it is original newspaper clippings. There are no copies. I don't believe they were Xerox copies. I think they were all originals.

Q. Do you remember how this was labeled?

A. Willis Carto or Liberty Lobby. I am not sure.

Q. Did the files consist entirely of published materials or were there handwritten items?

A. I believe they were all published materials.

Q. How did you happen to go to Wes McCun?

A. It was recommended by someone in my office, I believe, I got the name from Opal Ginn and the number, but it may have been Joe Spear.

Q. Were you told by Mr. McCun or anybody else why he would have had a collection on Liberty Lobby or Willis Carto?

A. I believe he had a lot of material on a lot of right wing groups.

Q. Is Mr. McCun connected with any particular organization or business?

A. Not to my knowledge. I think he heads his own organization.

Q. Do you know what it is called?

A. No, I don't.

Q. What does he do with all this material?

A. I don't know. I think he serves as a resource to some people.

Q. Do you know anybody who uses him as a resource, other than Mr. Anderson?

A. No, I don't know.

Q. Did you ever see Mr. McCun other than on the occasion when you visited him to take notes on his files?

A. I don't think so.

Q. Did he give you any information orally?

A. No.

Q. Did he make any suggestions?

A. No.

Q. Did he discuss the subject at all?

A. No.

Q. Do you recall what use, if any, you made of the information in these notes in preparing the article?

A. I know that the letter is attributed to -- in the article. Page 23, "Carto, of course, denies the implications. In a letter to the editor of the Bakersfield Californian in 1969, he said . . ." and on and on.

There may have been other instances in which I used this material. Do you want me to go through it?

Q. Sure. Mr. Bermant, as we go through these, what I'm trying to do is establish what you may have used from these notes when the source is not particularly evident from the text of the articles themselves.

In other words, if the article says something came from a newspaper clipping on a certain date, then I don't need to know.

MR. BRANSON: Mr. Lee, one of the features of Mr. Bermant's affidavit is an appendix, and as to every sentence in the article that you have singled out in your complaint as being defamatory, we have gone through those materials, the same ones you're now looking at, and put into the affidavit the sources for those statements.

So, the exercise would be redundant to go through it again. You will spend as much time doing it again.

MR. LEE: Unfortunately, I haven't had a chance to see the affidavit before asking my questions.

MR. BRANSON: I understand. But if you ask him to go through all that material again and say what is the source, it will be duplicating what we have already done for you in the affidavit.

MR. LEE: Fine. Let's have this marked. "Statecraft, a vicious smear sheet published for a short time in the late 1960s." That continues on to a second page which begins "Bakersfield Californian". The two are stapled together.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 6, for Identification and was retained by counsel).

BY MR. LEE:

Q. The next sheet from your production is a single typewritten sheet beginning, "Charles Raudebaugh, retired, reporter for 30 years."

Do you have that?

A. I do.

Q. Do you recognize it?

A. I do.

Q. What is it, please?

A. The text of two interviews I did, one with Raudebaugh and one with Pititclerc. This is material contributed to the Yockey piece. I obviously did it at home because it is my home typewriter.

Q. Did you do the interview by telephone or in person?

A. They were both done by the telephone.

Q. Who is Charles Raudebaugh?

A. He is a former reporter for the San Francisco Chronicle as is Pititclerc.

Q. How did you happen to hear about these people?

A. When I received materials from the San Francisco Chronicle, I copied them for names that I was going to call up both in the articles and bylines. I found that most of the reporters who wrote those articles were dead or couldn't be reached.

Someone in the city room may have known Raudebaugh and, probably, the number was given to me by the paper. He is retired in northern California.

Q. How did you come to receive materials from the San Francisco Chronicle?

A. I called them up and asked for the library. All newspapers have libraries where every article is held according to subject. I used the Washington Post, and the Los Angeles Times as a resource.

MR. LEE: Let's have this marked.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 7, for Identification and was retained by counsel).

BY MR. LEE:

Q. The next item consists of two sheets of paper stapled together. The first beginning, "Carto is more difficult than most people", and the second sheet begins "They really believe in the Constitution".

Do you have those two sheets?

A. Yes, I do.

Q. Have you ever seen them before?

A. Yes, I have.

Q. Can you identify them for me?

A. Can I talk to David for a second before I do so?

MR. BRANSON: Yes.

MR. LEE: Sure.

(Counsel and witness leave the room).

THE WITNESS: These are my notes from a phone conversation I had with a confidential source.

BY MR. LEE:

Q. About what date did you have this conversation?

A. It was --

MR. BRANSON: Excuse me. You're entitled, as a reporter, to protect the identity of your confidential source subject to a judge's order, and you're also entitled to protect information that might lead to the discovery of that confidential source.

If you identified the date and you made a long distance phone call, for example, which would allow someone to subpoena your phone records and to get the phone number and identify the source, then you don't have to answer the question.

THE WITNESS: With that in mind, it would have to be sometime during the month of June.

BY MR. LEE:

Q. Will you tell me how you determined that you wished to contact this particular individual?

MR. BRANSON: Again, you may answer the question, but you're entitled to withhold any information that would tend to identify the source.

THE WITNESS: Can you clarify the question?

BY MR. LEE:

Q. Well, I will ask it in another way.

How did you happen to hear of this source in the first place?

A. I was referred to him by a colleague.

Q. Was the colleague somebody in Jack Anderson's organization?

MR. BRANSON: Don't go too far.

BY MR. LEE:

Q. Let me ask you now, are you going to identify the source to whom you were speaking when you prepared these notes?

A. No.

Q. Your refuse to name the source?

A. I do.

Q. Looking at the content of your notes, based on your conversation with the source which you refuse to name, did you decide that the source was a reliable one as far as being a source of information for this particular article which you were preparing?

A. I did.

Q. Pardon?

A. Yes, I did.

Q. Did you have any reservations about the reliability of the source or about any of the information he gave you?

A. I did not. I had no reason to.

Q. Did you use everything that he told you in the article?

A. I did not.

Q. For example, did you use the statement, "They are not anti-Semitic. They have occasionally hired people of Jewish persuasion. They are not conservative, only anti-liberal."

A. I did not.

Q. Do you recall what you did use from this particular source?

A. The substance of the first line may have been used that Carto was more difficult than most people. The fact that he uses voice stress analysis or voice stress analysis was used.

I might go back to the statement you just read, that was not used because, in substance, both that and the fact that he uses voice stress analysis was confirmed by Bob Bartell and it is always better to go with an on-the-record source than an off-the-record source. It may be verified by an off the record source.

In the interview we made a deprecating remark about the military, et cetera. That was used. The bit about the lie detector was used. The part about "The Spotlight is a smaller operation than you realize. It is written every week by about three people who use a series of pseudonyms. Each reporter has two or three fictitious names." That was used but that was also confirmed by an independent source.

Q. Would you be able to tell me, considering your refusal to identify the source, what connection, if any, the source ever had to do with Mr. Carto or Liberty Lobby?

A. I refuse to answer that. I will say that he subscribes to the Spotlight.

Q. Did you use, in the article, the sentences which appear just above the bottom of the first page. "They are not anti-Semitic; only anti-Zionist"?

A. It wasn't used from this source. But, I believe that sentence appears in the article.

MR. LEE: Would you please mark that?

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 8, for Identification and was retained by counsel).

(Whereupon, at 1:00 p.m., the deposition was recessed, to reconvene at 1:45 p.m., this same day.)

AFTERNOON SESSION

(1:35 p.m.)

MR. LEE: Since Mr. Apple and Mr. Branson are here, I wanted to tell them that I just last evening managed to schedule a deposition of Vincent Drosdick who is the person mentioned in the article, for next Friday at 4:00 in the afternoon.

It will be at the offices of Harter, Calhoun and Williams, which is downtown in Washington. It will be a very brief deposition, probably less than an hour. You are getting a written notice sent out, but since the time is short, I hope the notice period will be satisfactory.

MR. BRANSON: Well, speaking for myself, I have a trial starting in Baltimore next Wednesday and I doubt whether I'll be able to attend on the Friday, because I assume the trial will take three full days.

MR. LEE: I had to schedule it based on what the witness said he could do, and I would not have chosen 4:00 o'clock on the Friday myself. Would you be able to have somebody else in the firm attend?

MR. BRANSON: Well, there is no one else in the firm who has any knowledge of this case. Mr. Devine, who you have met, is a law student and therefore, would not be the appropriate person to send to a deposition. Mr. Apple can speak for himself, but I know he has a trial coming up in September.

MR. LEE: The deposition notice supposedly is already being sent, so, if you would get back in touch with me, we will see what we can do.

As I said, the deponent chose the time and I just found out about it about 5:00 o'clock yesterday.

MR. BRANSON: The answer to this is if we both are unable to attend and have to object to that timing, the deponent may wish to be deposed at 4:00 o'clock, but you have the power of subpoena and may make him come.

MR. LEE: I understand.

BY MR. LEE:

Q. Since we were interrupted by a lunch break, let me just ask you a couple of questions.

Did any of the sources that we have discussed so far take the initiative in contacting you or were you the individual who sought out the sources?

A. I sought out the sources.

Q. Did any source take the initiative of contacting you before you thought of contacting them?

A. Yes, Mr. William Cox, an attorney in Los Angeles, California.

Q. How did Mr. Cox contact you?

A. He called our office. The nature of our operation is that we receive several hundred calls a week of people who want to give us stories.

I might amend an earlier remark about the duties of an intern. The duties of an intern is to take all unsolicited calls and separate the wheat from the chaff, so to speak.

In this case, the intern who received Mr. Cox's call was the same intern I had requested pull some columns and do some research, so, she knew I was working on the story about Liberty Lobby and she referred Mr. Cox to me.

Q. Did you speak to Mr. Cox on the occasion of his first effort, as far as is known to you, to contact Mr. Anderson's office?

A. I believe Mr. Cox called, talked to this intern who tried to switch Mr. Cox to me. I wasn't available. She took Mr. Cox's number and I returned his call.

Q. The same day?

A. I don't know. I think it was the same day or the day following.

Q. Can you tell me the approximate date that this occurred?

A. I believe it is in the affidavit. If not, at least close to it. June 15th or 16th.

Q. Did Mr. Cox indicate to you, when you talked to him, whether he had spoken to anybody connected with Mr. Anderson, prior to his telephone call the day before?

A. I returned his call and said I was calling from Jack Anderson's office and we began our conversation. I think that was assumed that I had gotten the number referral from this intern.

Q. Well, did he indicate to you that he had ever spoken with anybody else connected with Mr. Anderson?

A. No.

Q. Did Mr. Cox indicate to you whether he had over spoken, prior to speaking to you, with anyone else connected with Mr. Anderson or with Mr. Anderson himself?

A. He didn't.

Q. Did he indicate that he had not done so?

A. No, he didn't.

Q. What did Mr. Cox say to you, then, when you spoke to him?

A. He was the attorney representing Mel Mermelstein in his suit against the Institute for Historical Review. I had heard of the case. He gave me some more details.

He told me that he had been doing a lot of investigation of Mr. Carto, and his activities, and he said that Carto's outreach was incredible. I don't know the nature of his investigation.

He wanted -- at that point he was seeking limited publicity for his case.

Q. Limited publicity?

A. Yes. I can't speak for his motives.

Q. Why did you use the word "limited"?

A. I don't think he wanted to be, at that point, quoted or put on record as being critical of Mr. Carto himself. He was will-

ing to supply sources and supply documents, but, he was not willing to be quoted.

Q. Did he explain why?

A. He said the case was under litigation.

Q. Did he tell you why he was interested in getting this publicity?

A. His main purpose, at that point, was to have the judge in California take judicial notice of the holocaust, the fact that it did occur.

He felt that he wanted to get that message out to the public, hopefully, to maybe even shape public opinion. I really can't speak for his motives. I think he was just seeking some publicity.

I know I was not the only media person who used him as a source at that point.

Q. Do you know whether or not he contacted other media people?

A. I believe he did. I requested, after he contacted me, that he not contact other reporters with the same information. Mr. Anderson insists on exclusivity on all the stories that we publish.

Q. What did Mr. Cox say to that?

A. He agreed, to the best of my recollection. Of course, he could not, if a reporter called him up and asked him a question, he could not really -- I would not ask him to not answer the questions. That would be unfair to him and it is really not fair to me, either.

Q. Did Mr. Cox explain to you whether or not there was any other individual or group interested in publicizing the Mermelstein case or having material published about Mr. Carto or Liberty Lobby?

A. I don't believe he did as I recall.

Q. Could you continue to sum up what was said in your conservation with Mr. Cox the first time?

A. I don't recall the conversation. I do not believe I took notes at that point. I realized from the instant that I talked to him that he would be a good source.

He introduced himself as saying that he had worked for the Justice Department for many years. He worked as a Los Angeles policeman for many years. He was now a practicing attorney.

I asked him to mail me some of this information, of these public court documents that he already filed and he said he didn't want to do that because he was expected to be in Washington the following Sunday which, do you mind if I look at my affidavit?

Q. No, not at all.

A. Which was June 21st. My theoretical deadline and they are always theoretical, was that Friday, which would have been the 19th and I got that extended because I figured that the information I expected to get from Mr. Cox would help my story.

Q. What happened next, then, in relation to Mr. Cox?

A. I met him at the Hyatt Regency.

Q. When? Well, I believe the dates are in your affidavit.

A. This was Sunday the 21st. I went up to his room. We talked for an hour or so. I met him on two occasions. I believe one was in June and one was in July. On one of those occasions, we had lunch downstairs. On one of those occasions, we spent the entire time in his room.

He supplied me with several court documents and I spoke to him both on an off-the-record and on-the-record basis.

Q. Was he willing, at that time, to have his name used in attributing quotations?

A. Some quotations he was.

Q. What quotations was he not willing to have his name used?

A. There were a number of them that I cannot recall. One I can recall is one that was printed in the article and it is in the affidavit.

Q. During any of the periods you were talking with Mr. Cox, did he explain to you what his purpose was in giving you this material, beyond what he had explained in the first phone call?

A. He was, well, he hadn't been a lawyer for that long, I think only a couple years. After several years on the police force, he was frustrated and so went to law school at night or something. He had a very small firm.

He really believed in this case. He thought that it was outrageous that anyone would suggest that the holocaust not hap-

pen. He was going to prove his side of the case the best way he knew and he told me, although, and I had the reason to believe him, that he was financing much of this himself; that his fees for Mr. Mermelstein didn't really cover his expenses, but since he believed in this case, he was flying all over the country and gathering information and conducting the investigation with funds out of his own pocket.

Q. Did he refer you to any other possible sources of information?

A. One that comes to mind has nothing to do with the article. A woman who investigated -- it is irrelevant.

Q. You mean has no connection whatsoever with this?

A. It was on another story.

Q. Within the article, there are references to the Anti-Defamation League which I will call the ADL, as a course of information.

Do you know whether or not Mr. Cox went to the ADL? Now, you have to go by your own knowledge. I can't ask you to read his mind or something like that.

A. I don't recall.

Q. Did he discuss any other groups or individuals with you that you might contact for any purpose, in connection with the subject matter of this article?

A. I don't recall any. My memory could be foggy. I do not think -- if he did, it wasn't a significant source, but I don't think he did.

Q. Did he tell you what he would like to see in print on this subject?

A. He would like to see an investigation of the Liberty Lobby activities. He wanted to have the whole story told.

Q. Did he speak with anyone else connected with Jack Anderson or the Investigator Magazine, to your knowledge?

A. At some point he did talk to Joe Spear, but I do not know if that was -- I know that wasn't before the article was published. It was shortly afterwards. I don't know, you know, I think sometime last year he did talk to Joe Spear.

Q. Do you have any knowledge of your own that contact with Mr. Spear that you can tell me?

A. I initiated it and I listened on the other line. I don't recall the substance.

Q. Why did you initiate it?

A. I don't remember. I don't recall.

Q. Do you recall anything about what you heard while you were listening on the line?

A. I don't recall.

Q. Did it have any connection, at all, with the articles that we have been talking about?

A. Let me just think. I can't remember. We may have been deciding whether or not to follow up -- I think Mr. Cox had just won his case. The judge took notice and we may have been deciding what kind of follow up we would do about the story, and I think it was decided that we would not do a follow-up.

Q. Do you remember why?

A. Because of the lawsuit. We didn't feel that it was right for us to report anything concerning Liberty Lobby while under litigation.

Q. You're referring to the lawsuit which we are now involved?

A. Yes.

Q. Mr. Cox, you said, gave you some materials from court files. Did he given you anything else, written?

A. He also gave me several newspaper articles from the Torrence, Long Beach in Los Angeles newspapers, concerning his case. Also, some background articles from the Los Angeles Times. I believe it is all in that box.

Q. Yes, I believe from what you're saying, that I have seen those materials.

Q. I would like to ask you whether or not Mr. Cox gave you, orally, any information which you don't have any record of in the written materials you have produced?

A. It is very possible. We talked for several hours.

Q. What did you talk about?

A. About his case; about my story; about California. It wasn't totally business.

Q. Can you recall anything that appeared in the article which was based on what Mr. Cox orally gave you during one of your meetings with him. During any of your meetings with him?

A. No, if there is no written record of it, then it didn't appear.

Q. Did you take any notes of the conversation?

A. Yes, I did.

Q. Do you know if those notes were produced in discovery in this case?

A. They weren't. I don't usually keep my notes. What I do, after an interview is finished, I will type up the relevent portions of the interview and keep those notes.

Q. Is there any further contact with Mr. Cox that you can put on the record here?

A. I do recall I may have met him a third time at the Hyatt Regency; either I met him or we talked about it and we didn't.

I have talked to him periodically over the past year.

Q. Did he name for you, specifically, any of the sources of information which he had consulted prior to speaking with you, aside from newspaper clippings, published materials.

A. What do you mean by sources?

Q. Individuals or groups which he had contacted or been in communciation with about information on Willis Carto or Liberty Lobby?

A. I don't recall. I think the bulk of his information came from his investigators.

Q. You said he indicated that he was paying for a lot of his own time?

A. Yes.

MR. BRANSON: Excuse me, I certainly don't mind you asking questions relevant to this lawsuit, but I don't think we should be engaged in discovery that may be useful to Mr. Carto in another lawsuit in California.

The question you just asked has no relevance in this lawsuit. It may be of interest to Mr. Carto in another lawsuit.

BY MR. LEE:

Q. Are you going to answer it?

A. Repeat the question.

Q. I asked you if Mr. Cox indicated who was paying him for all the work he was doing, aside from what he was paying for himself?

A. No. No.

Q. Let's go back to these papers which the defendants produced in this lawsuit.

The next sheet begins, "I refer to Imperium regularly."

A. Right.

Q. This sheet, by the way, contains a couple of areas that are not very distinct, but I think we can understand the meaning.

Would you please tell me whether you have seen this document before?

A. Yes, I have.

Q. Could you describe for me what it is?

A. It is my notes from a telephone conversation, I can tell by the typewriter that I did it at home. It is an interview with the confidential source who I will not name.

Q. Would you tell me whether you had reason to believe before contacting this source, that it would be a reliable and truthful source?

A. I had no reason to believe that it wouldn't be.

Q. On what do you base your opinion -- let me say, on what did you base your opinion, prior to contacting any of the sources you used in preparing the articles, as to their reliability and truthfulness? In other words, what criteria or principles were, in your mind which would satisfy you that a source would be more likely to be truthful and reliable than not?

A. If what that source says can be corroborated by independent means or if what that source says agrees with what I know to be true.

Q. Would you consider if you knew something to be true if one person told you that it was true and another source said it was not true?

A. It would depend on what it was.

Q. What would you resort to, at that point, in order to determine which one would be reliable if you were to use it in an article?

A. A third source.

Q. Did you feel, after consulting the particular source which is the source of this document, that the source was a reliable and truthful source:?

I asked you a moment ago, if you felt, beforehand, that it was, and now I am asking whether you felt, afterwards, whether it was or not?

A. If I recall, I was referred to this source by someone I respected and I asked the person who referred me to say if this person could be trusted, if he was reliable and I received an affirmative answer.

Q. Did you use any portion of this information in preparing the article?

A. I believe several words of this interview made their way into our introduction. Others were in the article. Yes. I think quite a bit of this was used.

MR. LEE: Let met ask that this be marked, please?

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 9, for Identification and was retained by counsel).

BY MR. LEE:

Q. I notice that your notes on these interviews or conversions are typed. You've said sometimes they were typed on your home typewriter.

What was the procedure that you were using? For example, were you speaking on the phone and then sit down and type out your notes?

A. Yes, that is usually what I did.

Q. You didn't type while you were on the phone?

A. No, sources find that annoying.

Q. About how long after the conversation, in this case, would you say it was before you typed the notes?

A. In all cases I type the notes immediately after I finish the interview. For one reason, I cannot write as fast as some people talk and at that point, if I type immediately, I am able to reconstruct the conversation.

Q. In any of these cases, and by these cases, I mean cases in which you have retained notes of conversations, in any of

those cases, did you ever recontact the source for clarification or further discussion?

A. I don't recall. I would have to go on a source-by-source basis. In this case, no.

Q. Did any of the sources ask that they be permitted to hear what you were going to publish prior to publication?

A. None did. If they had asked, I would only have read back portions of what had to do with them, their quotes and the context in which it was placed.

Q. In your conducting of these interviews, I have to ask you, since the notes, apparently, contain simply what was said by the person being interviewed, were these comments by the source of information elicited as a result of specific questions from you?

A. Yes, sir, they usually are.

Q. So, in other words, is it correct to say that you did not just call up and say would you tell me everything you know about such and such?

A. No.

Q. The next paper appears to be headed Karesh, K A R E S H.

A. Right.

Q. "I thought it was strange that he was living with the director" is the first line. Let me have this marked, first.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 10, for Identification and was retained by counsel).

BY MR. LEE:

Q. Referring back, however, to Bermant Deposition Exhibit 9 which began "I refer to Imperium regularly", you have refused to identify the source, have you not?

A. I have.

Q. Would you tell me whether or not the source, to your knowledge, was ever employed by Liberty Lobby?

A. I can't answer that.

Q. Because you don't know or because you refuse?

A. Because I refuse and I want to protect the source.

Q. All right, now, returning to the next exhibit which has now been marked 10, are you familiar with this document at all?

A. Yes, I am.

Q. What is this, please?

A. This is a similar interview transcript with a guy named Joseph Karesh. I would have to refer to the article. He is quoted. So it has to do with the Yockey piece. It has nothing to do with the Carto piece.

Q. The "he" referred to in here is the Yockey piece?

A. Yes.

BY MR. LEE: The next one I will have marked is this.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 11, for Identification and was retained by counsel).

BY MR. LEE:

Q. Have you ever seen this?

A. Yes.

Q. What is it?

A. A similar transcript of a short phone interview I did with Congressman George Hansen of Idaho.

Q. Did you use any of the contents of this interview in the article?

A. It was used in one of my drafts, but it was omitted from the final piece.

Q. Did you omit it or was it someone else's decision?

A. Someone else's.

Q. Decision to omit it?

A. Yes.

Q. Did you feel that Congressman Hansen was a reliable and truthful source?

A. I did.

Q. The next item is headed, "United Congressional Appeal." It begins with the name "Irwin Sewell."

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 12, for Identification and was retained by counsel).

BY MR. LEE:

Q. Once again, while the reporter was marking that I thought of a question on the previous exhibit, which is 11, in Congressman Hansen's notes.

Do you remember what of Congressman Hansen's interview you did include in the first draft or which you did submit to the editors?

A. I could refer to the draft.

Q. All right. We'll come to that. Going ahead to the paper now marked Exhibit 12 which is headed United Congressional Appeal, do you know what that is?

A. A transcript of an interview I had with Irwin Sewell who is a factfinder director of the Anti-Defamation League in New York.

Q. How did you happen to be in touch with him?

A. I was in touch with the Washington office. I had heard from a source, I don't know where, that the Anti-Defamation League had gathered quite a bit of information on Carto and Liberty Lobby.

I sought to acquire some of this information and I did, and I had some follow-up questions and they referred me to Mr. Sewell rather than having me talk to anybody down here.

Q. And you spoke with Mr. Sewell in what way?

A. I'm sorry?

Q. By what method did you speak with Mr. Sewell?

A. Telephone.

Q. About how long did you talk with him?

A. I don't recall. It looks like about twenty minutes. It is impossible to say, really.

Q. Did he give you any information not contained in these notes, either in written form or in oral form, which you didn't make a note of?

A. No.

Q. Did he refer you to any other possible sources of information or help?

A. I don't think so.

Q. Did Mr. Sewell, by any chance, mention Mr Cox or the Mermelstein suit?

A. I don't recall, but it is not on here. He may have.

Q. I see here now, this might refresh your memory, it says, "IHR" which apparently refers to the Institute for Historical Review or something, "has asked for photographs or witnesses."

A. Yes.

Q. I just wondered if having noticed that you would recall anything he said to connect it with that suit?

A. I don't know if he said anything about the suit, but I think, in this case, he was referring to the offer. We really didn't talk about the suit. I think if we had talked in depth about the suit, it would be reflected on my notes.

Q. We're finished with that, then.

I will go on to ask you whether or not you will have access to the pictures which you say you sent to Mr., I'm sorry, I have forgotten his name.

A. The art director?

Q. Yes.

A. Springsteel.

Q. Do you still have those pictures?

A. No.

Q. Do you know where they are?

A. No, I don't. We no longer have a New York office. Mr. Springsteel no longer works for us.

Q. What was Mr. Springsteel's employment relation with whoever it was he was related to in connection with preparing this article? Was he working for Jack Anderson?

A. For the Investigator and later for the Investigator Reporter.

Q. Do you know where Mr. Springsteel is now?

A. Somewhere in New York City.

Q. Did he operate under any name other than his own personal name?

A. Not to my knowledge.

Q. So, if one were trying to find him, you would look for Mr. Springsteel's name?

A. I believe he is in the book.

Q. If you answered this before, don't again, but, do you recall whether or not you ever met with Mr. Jack Anderson and discussed the article prior to its publication?

MR. BRANSON: You have asked and answered that question.

BY MR. LEE:

Q. I thought you said you had met him. Can you recall anything that you haven't already told me about the content of any discussions you had with Mr. Anderson?

A. I cannot.

Q. In the answers furnished by the defendants to interrogatories, certain persons are named. I would like to go over these and to the extent that you haven't already told us what you know about these people in connection with this publication, I would appreciate it if you would tell me.

Bob Bartell, you have said you interviewed him. Did you interview anyone else at Liberty Lobby:?

A. I did not.

Q. The name Robert Eringer appears here. Do you know who that is?

A. Mr. Eringer is a freelance writer.

Q. What was his connection -- incidentally, to be fair to you, the question was: "Identify all persons who contributed services, materials, information or anything else to the Investigator Publishing Company or the Investigator Magazine from the time that the first idea for the articles occurred and the time that the articles were distributed to the public," and then, in answer, these names were listed: Jack Anderson, Joe Spear, Charles Bermant, John Obert, Bob Bartell and, now, Robert Eringer.

So, I am asking you to tell me whatever you know about Robert Eringer, please.

A. Mr. Eringer is a freelance writer, currently living in London. He was, at the time of our contact, living in New York.

When we began publishing the Investigator, we had quite a bit of publicity. It prompted several people a week to call us up and ask if we were interested in any story ideas. I would take those calls and I would ask the writer to send in anything that they might have.

I asked Mr. Eringer, when he called, what he had and he said that he had a piece completed that was partially published by Mother Jones about Liberty Lobby, and I asked to see his draft.

He mailed that draft, along with drafts of two other stories, and a book that he had published to me, and I received it in mid May.

Q. Is that draft among the things produced by your counsel for me?

A. No, it is not.

Q. Where is that draft?

A. I don't know.

Q. What did you do with it when you got it?

A. I read through it. I found it to be very interesting. I found it to be well written. I filed it at that point and I referred to it later.

Q. What became of it, physically speaking?

A. The draft, I don't know.

Q. It was in your possession for some time, correct?

A. I haven't seen it in eight months.

Q. Where was the last place you saw it?

A. In my office.

Q. Well, do you think it was stolen or what?

A. I think it was thrown away.

Q. Do you recall any particular information given to you by Mr. Eringer which you used in the article?

A. There was quite a bit. It is mostly contained in the affidavit and cited.

Q. Do you know if Mr. Eringer had used or used any names other than Robert Eringer?

A. I don't know. Excuse me, I do recall one of the stories that he sent me had to do with infiltration of the Ku Klux Klan which he did, and I believe he used a different name when he was doing that.

Q. Do you know what it was?

A. No, I don't recall.

Q. Did Mr. Eringer tell you whether or not he had ever done any writing or work for Liberty Lobby or Willis Carto?

A. No.

Q. He did not tell you?

A. No.

Q. Do you know, from any other source, whether he did or not?

A. I do not.

Q. Did he tell you on what he based his expertise concerning Liberty Lobby or Willis Carto?

A. Well, it was obvious from his draft that he put a lot of work into it. He interviewed quite a few people and had done a lot of research.

I found that many of the key facts in his article were corroborated by my own research, certain articles by National Review, True Magazine and the Washington Post were contained in Eringer's article, leading me to believe that he had used many of the same sources I had used.

MR. BRANSON: Excuse me, let's have a break for a moment.

(Short recess).

BY MR. LEE:

Q. The name Paul Valentine appears here. What can you tell me about him?

A. Paul Valentine is a reporter for the Washington Post. He covered all aspects of Liberty Lobby several years ago. He is now, I believe, an assistant city editor of some kind.

Q. Was he one of your sources of information?

A. He was a source of information when I used what he had written.

Q. Did you speak with him yourself?

A. What?

Q. Did you speak with him?

A. Yes, I did.

Q. What did he tell you or say when you spoke to him?

A. There was a couple quotes he gave me which were included in one of my drafts and were not included in the final.

Q. Do you recall the substance of those quotes?

A. I recall the substance. There may have been other parts of it, but the substance was Valentine covered Liberty Lobby's fifteenth birthday and ran into Carto and Carto made a big stink about it and lost his temper.

I recall Valentine saying something like "He was just doing it to show off". There may have been other instances.

Q. How about Dotty Shelton? D O T T Y, Shelton, S H E L T O N?

A. She is the Washington Post librarian, or one of them. As I described to you about the San Francisco Chronicle, we use the Washington Post library on a regular basis. She is the liaison. I say, Dotty, we need this or that and she pulls the files for us.

Q. Did she tell you anything herself?

A. Thomas Francis. F R A N C I S, Thomas Francis holds the copyright to several of Francis Parker Yockey's manuscripts and they were published, I believe, in April or May of last year, by a far right publication in West Virginia called Liberty Bell.

I called Liberty Bell. I wanted to talk to Thomas Francis. They said, we won't give you his number, but I will pass on a message and Mr. Francis called me.

Q. Did he give you any information that you used?

A. I believe he was quoted in the Yockey article and he corroborated certain things that were in the Carto article, although he was not quoted in the Carto article.

Q. Do you remember what items he corroborated?

A. I don't recall at this point. I believe he did say, very definitively, that Mr. Carto was anti-Semitic.

Q. Then you have Bernie Springsteel and persons he retained.

Could you tell me the names of anybody retained by Mr. Springsteel?

A. No, I don't know. The only way I would know is if the article was signed.

I met some of them when I was in New York. They would come by and deliver things.

Q. Do you know who actually did the illustrations for the articles we're talking about?

A. No, I don't.

Q. As regards to confidentiality of your sources, you have refused to identify at least two sources on that basis.

On what grounds are you determining that their names should be dept confidential?

A. Their request.

Q. Did you make any agreement with them at the time you talked to them?

A. I did.

Q. What did, taking them individually, what did they say to you in terms of their identity remaining confidential? For example, did they make it a condition of the interview, or did they just say they would rather prefer that it not be mentioned?

A. It was a condition of the interview.

Q. I have a stack of drafts of the articles here which were produced by the defendants.

At this stage, I have no idea what came first. They are so voluminous that I didn't copy them to make you a copy. So, I will have this marked and then pass it over to you and then your attorney and you can familiarize yourself with it and we can discuss the origin of these various drafts.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 13, for Identification and was retained by counsel).

BY MR. LEE:

Q. Incidentally, I have, myself, on a few of these, written in pencil at the top where I got them. That has nothing to do with the content of the article. The one you are looking for has been marked as Exhibit 13.

Looking at that, could you please tell me anything you can that would identify it for me as someting in the chain of the preparation of the article.

A. This is John Obert's draft.

Q. That would be a draft done when?

A. I don't know exactly when, but after my original draft.

Q. Do you recall if you have ever seen this before?

A. Oh yes, I am sure I have.

Q. Is that because Mr. Obert's work was shown to you after he did it, prior to publication of the article?

A. I know it is Obert's because he has his name on it.

Q. That is not what I asked you?

I said, did you see this draft prior to the publication of the article?

A. Yes.

Q. Then I asked you if all of Mr. Obert's work on your article was given to you before the article was published?

A. Yes, it was.

Q. Could I see it, please?

A. Sure.

Q. Do you know if this was the first version of the article which Mr. Obert wrote after receiving your version?

A. I don't know how many personal drafts he wrote. I would assume that if it is not the first, it would be the second.

Q. Why don't I, first, make a note of what these are and then we can take them in a logical order.

Number 13 is Mr. Obert's draft.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 14, for Identification and was retained by counsel).

BY MR. LEE:

Q. Do you recall if you have ever seen that before?

A. This looks like a draft of the Yockey piece. I think it was probably the first draft of the Yockey piece. There was another draft and, as far as Anatomy of a Sane Man, I have never seen that before, but I assume Mr. McGaw wrote it. That is on top.

Q. That is my writing. Whose draft would this be?

A. This is mine.

Q. You said first draft, so, in other words, that was probably your first version of the article?

A. Yes, because there is another version in there somewhere. I retyped this article.

Q. The next one has the caption, "Willis Carto, Patriate or Fascist." Once more, it appears to be a manuscript.

THE WITNESS: It is the same story with different editing marks. It looks like to me, the first exhibit, Number 13, which you got from Mr. McGaw, has his editing marks on it.

BY MR. LEE:

Q. And Exhibit 15 is what?

A. Is from us. So, since Mr. McGaw's input was not apparent on my article, this is really not a valid document.

Q. Which one is not a valid document?

A. This one that says McGaw.

Q. What is the number?

A. 13.

Q. How do you mean is not a valid document?

A. I mean the difference on this, from this really don't apply to us, because --

(Indicating).

"This" and "this" refers to 13 and 15.

Q. Your testimony is, then, that the Exhibit 13, having been edited by Mr. McGaw, never had any effect on the article itself?

A. Well, there are editing marks and question marks.

MR. BRANSON: Wait a minute. You don't know who put the marks on the page, because Mr. McGaw's corrections appear to have been Xeroxed, but somebody has written in pencil on the Xerox copy with blue and red pencil. All you can say is that you never saw it with McGaw's editing marks on it.

MR. LEE: Why don't you state that, then.

THE WITNESS: I never saw Exhibit 13 with Mr. McGaw's editing marks on it.

BY MR. LEE:

Q. What have you to say about 15?

A. Some stage of the article written by John Obert and some of the additions are mine and some seem to be Obert's, some of the editing.

Q. All right, we'll come back to those changes.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 15, for Identification and was retained by counsel).

BY MR. LEE:

Q. The next one is headed in the upper left, "Francis Parker Yockey by Charles Bermant". I will ask that this be marked as 16.

(Whereupon, the above-mentioned document was

marked as Bermant Deposition Exhibit No. 16, for Identification and was retained by counsel).

BY MR. LEE:

Q. I will ask you to tell me whether or not you've seen that before and, if so, whether you can identify it?

A. This is the final draft, my final draft of the Yockey piece before it was sent to Obert.

Q. I can take that back and give the next manuscript to the reporter. It is headed, "Who was Francis Parker Yockey" and contains Mr. Obert's name and address.

A. That is his rewrite.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 17, for Identification and was retained by counsel).

THE WITNESS: That became that. This draft, Exhibit 17, is a rewrite of Exhibit 16.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 18, for Identification and was retained by counsel).

BY MR. LEE:

Q. Who rewrote it?

A. John Obert.

Q. Judging from the title, "Who was Francis Parker Yockey" this manuscript pertains, entirely, to the Yockey article, is that correct?

A. Yes, it does.

Q. The next one is entitled, "The Nazi Underground in America" and like the others, consist of a number of typed pages.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 19, for Identification and was retained by counsel).

THE WITNESS: This is or seems to be what was sent to New York for typesetting.

This is both articles. It is retyping of John Obert's final rewrite as edited by Jack Anderson, typed by Opal Ginn, and sent to New York for typesetting.

Q. Thank you.

The next one, which will be Exhibit 19, has no caption, although someone has written by hand, "Article 1," on the first page and then following, on Page 4, the words "Article 2".

Each one is three or four pages long and they are stapled together with a number of photocopies of documents.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 20, for Identification and was retained by counsel).

THE WITNESS: This is what was given to me when I was assigned.

BY MR. LEE:

Q. All right.

A. As I described before.

Q. Were you told where it came from?

A. I was not.

Q. Have you ever learned its origin?

A. I did not.

Q. Was there ever any indication given to you of when Exhibit 19 had been written or prepared?

A. No indication was given.

Q. Two questions about this, number 1, just to be sure we have the record straight, this was given to you, this being Exhibit 19, by Mr. Spear when he first assigned the story to you?

A. That's correct.

Q. Now, as far as Mr. Eringer is concerned, what he gave you was something entirely different from Exhibit 19, is that correct?

A. That's correct.

Q. Just based on the content of these, would you be able to make any judgment as to the likelihood or lack of it, that Mr. Eringer prepared Exhibit 19?

A. To the best of my knowledge, Mr. Eringer did not have anything to do with Exhibit 19. For one thing, it was - -

MR. BRANSON: That's all right.

THE WITNESS: It was presented to me prior to Eringer's call.

BY MR. LEE:

Q. And Mr. Spear said nothing whatsoever about the na-

ture of this document or why he was giving it to you?

A. For background.

Q. Did you ask him where it came from?

A. No.

Q. I see, as soon as I glance back, that the attachments to the articles in Exhibit 19, that the first is a statement of qualifications of alien, and has the name McCaulden, William David. McCaulden being the family name.

Do you know who Mr. McCaulden is?

A. The former director of the Institute for Historical Review. He was writing under the name Louis Brandon. Mr. Spear headed the effort to offer the $50,000 reward to anybody who could prove that Jews were gassed -- the case is in the affidavit or described.

Q. Are you familiar with the documents that are attached here within Exhibit 19?

A. I'm not.

Q. Did you make any use of these in the article?

A. I did not.

Q. We have another document, captioned Willis Carto-Lobbyist, consisting of five pages.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 21, for Identification and was retained by counsel).

BY MR. LEE:

Q. Tell me if you have seen that before, and, if so, what information you can give me about it?

A. I recall, now, that this was also given to me by Joe Spear, so, I was incorrect before when I said he had only given me two things. He had given me three.

Q. When did Mr. Spear give that to you?

A. At the same time.

Q. At the same time as he --

A. At the same time as he gave me the last exhibit and the copy of Imperium.

Q. Did he tell you anything at all about the document now marked Exhibit 20?

A. He did not.

Q. Did Exhibit 19 or 20 lead you to contact any particular sources?

A. I don't recall. I used them for background. But I think there was nothing in there that was particularly new.

Q. Did anybody connected with Jack Anderson or the Investigator tell you why these two items, Exhibits 19 and 20, would be dependable as sources of information?

A. There was no such discussion.

Q. The next document is a single page headed A.D.D./Carto.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 22, for Identification and was retained by counsel).

(Witness reviewing document).

THE WITNESS: This was something I wrote as an addition to one of my drafts.

BY MR. LEE:

Q. Do you remember which draft it was in addition to?

A. No.

Q. Do you recall what prompted you to make this addition to your draft?

A. I don't recall exactly. It may have been done after Obert's rewrite and he may have omitted information I thought to be pertinent, and rather than go through crossing it out, I just wrote a few paragraphs.

Q. I have one more document that was produced by the defendants which is not a manuscript draft, but which I will show you and ask you if you have ever seen it before.

(Whereupon, the above-mentioned document was marked as Bermant Deposition Exhibit No. 23, for Identification and was retained by counsel).

THE WITNESS: Yes, I have.

BY MR. LEE:

Q. Now --

A. It is a press release prepared by Sherwood Ross Associates, that was used in conjunction with publicizing the magazine.

Q. Do you know who wrote the copy that's printed there in that press release?

A. I believe it to be Sherwood Ross.

Q. Who would have given them information they needed with which to write that?

A. He would have gotten it from the magazine.

Q. The Investigator?

A. Yes, he would have been given a copy of the magazine.

Q. Oh, I see, he would have looked at a copy of the actual magazine?

A. Yes, it was written from the magazine. He took the highlights of the article. He did one of those for every story in the magazine.

Q. What did he do, then, with these press releases?

A. He would pass out copies of the release along with the magazine. It is common public relations procedure.

Q. Do you know what his business relation was to Jack Anderson or the Investigator Magazine?

A. He was the publicity director for the Investigator. I know nothing about his connections with the office.

Q. Would you please take a look, if you like, at the Exhibit marked 21, which is what you termed your addition to one of your drafts, and would you just tell me what the source of that information is?

(Witness reviewing document).

THE WITNESS: The answer to that is in the affidavit. It is on Page 43.

MR. BRANSON: No.

THE WITNESS: I'm sorry, Page 36. That comes from a number of sources.

BY MR. LEE:

Q. Not having read all of this affidavit yet, since I just received it this morning, I would like to ask you whether the sources named here are sources which you personally observed? I'm speaking of written sources which is why I say "observe".

MR. BRANSON: You mean read it?

MR. LEE: Yes.

BY MR. LEE:

Q. In other words, when the Congressional Record put out the name, you were going directly from the record. You weren't seeing a quote from the record in Mr. Cox's --

A. No.

Q. The notice at the top of Page 37, Mermelstein versus Institute of Historical Review, declaration of William Cox, at 11." That followed about a meeting which Mr. Carto was supposed to have attended, according to this.

Q. Did Mr. Cox give any source for the allegation made here?

A. To the best of my knowledge, the original source for that is True Magazine and the story also appeared in the Washington Post and in the National Review.

Q. Did you consider True Magazine a reliable source?

A. Yes, I did.

MR. BRANSON: The article was written by his boss.

BY MR. LEE:

Q. Did Mr. Spear tell you anything about what had happened when True Magazine published its article about Mr. Carto?

A. No, he didn't.

Q. Were you aware, from any source, that True Magazine was sued and came to a settlement and published an article to make up for the harm they had done with this particular article?

A. I was not.

MR. BRANSON: Of course, Mr. Lee, there is no implication intended, I am sure, on the fact that because someone settled the lawsuit and admitted it was libelous and caused harm. Many people settle to get out of litigation.

MR. LEE: Probably nobody knows.

MR. BRANSON: Exactly my point.

MR. LEE: I accept your statement. However, I am not granting you my agreement that True Magazine settled even though they had not printed anything that was defamatory.

MR. BRANSON: I don't even know that they were sued or settled.

BY MR. LEE:

Q. It is my understanding they were sued, whether by Mr. Carto, or Liberty Lobby, or both, I am not sure, and there was a lengthy article published, subsequently, in which True Magazine, presumably, was making up for the problems it created. But, we can establish that in some other way.

But you say your boss, or Mr. Branson said your boss, wrote the True Magazine article?

A. Co-wrote.

Q. Who were the two authors?

A. Joseph Trento or Joseph Spear were the two authors.

Q. Let's look at the article itself and then to what extent it seems feasible, we'll come back to the manuscripts we have been discussing.

Do you have a copy of the Investigator Magazine articles entitled "America's Neo-Nazi Underground," before you?

A. I do.

Q. Marked as Exhibit 1.

On the cover of the magazine, it features a picture of a man. Is that Francis Parker Yockey?

A. Yes, it is.

Q. Do you know who conceived the title which appears on the front page of the magazine, "America's Hitler: Francis Parker Yockey"?

A. I believe it to be Jack Anderson.

Q. Do you know when he originated the title?

A. I do not.

Q. How do you know that it was Mr. Anderson?

A. Because Mr. Anderson wrote most of the titles and headlines.

Q. Now, turning to Page 20, where the articles begin under the common heading, America's Neo-Nazi Underground, do you know who wrote that heading? Originally?

A. In my belief, I think it was Mr. Anderson.

Q. The following statement "Did Mein Kampf spoil Yockey's Imperium, a book revised by Liberty Lobby". Did you write that?

A. As I stated, Mr. Anderson wrote most of the titles and headlines.

Q. Do you know what the factual basis is, if any, for the statement that Imperium was revived by Carto's Liberty Lobby?

A. The factual basis is that it was published by Willis Carto and he took the book out of obscurity, and published it, and allowed circulation of the book.

Q. You say Mr. Carto published it?

A. That's correct.

Q. But it says here, a book revived by Carto's Liberty Lobby.

A. Liberty Lobby was used to distribute the book.

Q. You mean by that, Liberty Lobby sells the book?

A. Yes, by mail and in person.

Q. But, you're saying Mr. Carto published the book?

A. Yes.

Q. How did Mr. Carto go about publishing the book?

A. He has a publishing house of his own where he publishes, I believe, a variety of titles. Noontide Press. I believe it is located in Torrence, California.

Q. You say that's a publishing house that belongs to Mr. Carto?

A. Yes, to the best of my knowledge.

Q. By that, do you mean that he owns a commercial enterprise which is a publishing house?

A. Yes.

Q. What is your source for that information?

A. A variety of sources. Some of them are in the affidavit.

Q. Incidentally, I don't want to waste your time, so, if there is something that you know is in the affidavit in complete detail, just tell me that.

MR. BRANSON: The only discussion in the affidavit relates in respect to the sources in detail, relates to the sentences that you have claimed were false and defamatory.

The sentence that you have been talking about, the book by Carto you did not complain about in the complaint. So, we didn't bother telling you about the sources of it.

MR. LEE: There was something in the complaint in the general subject area but this one line was not.

MR. BRANSON: Neo-Nazi Underground you complained about and we gave you all the sources for that.

BY MR. LEE:

Q. Did you complete your answer to that question?

A. I believe it to be common knowledge that Carto owns and operates Noontide Press. The one specific instance I can remember, although I am sure there are others, is the National Review piece, which states that very fact.

Q. Now, as to the introductory section which you said was written by Mr. Jack Anderson, I want to ask you about three statements there and if you know anything about the origins of these statements, I would like you to tell me, please.

But, prior to that, would you tell me, if you know, on what Mr. Anderson based his introduction?

For example, was he simply given Mr. Obert's version of your articles and then set loose to write it, or did he base it on anything, to your knowledge, other than that?

A. He was given finished drafts of both pieces and took certain facts and quotes out and he wrote the introduction and based on or coupled with his own knowledge and his own background, wrote the introduction.

Q. Did you make any contribution to the introduction, other than the fact that you had written the first drafts of the articles?

A. I read the introduction when it was in that form, in the final draft.

Q. Were you asked to make any comment for Mr. Anderson on the comment of his introduction?

A. I was not.

Q. Did you make any comment to Mr. Anderson?

A. I did not, aside from perhaps a compliment.

Q. For example, a few lines down in the first column, "but a more sinister neo-Nazi cabal, men of influence and cunning, lurk in the shadows."

Do you know what the source of that statement was?

MR. BRANSON: That is in the affidavit.

MR. LEE: All right. We'll go ahead, then.

BY MR. LEE:

Q. How about in the final paragraph of the introduction, the book Imperium, meanwhile, is circulated only among the elect."

MR. BRANSON: That is discussed in the appendix of the affidavit.

MR. LEE: All right.

BY MR. LEE:

Q. If you would please now look on Page 21, as I have made note of some passages from your article, The Private World of Willis Carto, by Charles Bermant, which I would like to ask you about.

The line at the bottom, the last line, or I should say the last sentence beginning on Page 21 is: "Or do Carto's opinions march goosesteps beyond the pale of responsible American conservatism."

Did you write that line?

THE WITNESS: No, I did not.

BY MR. LEE:

Q. Do you know who wrote it?

A. Either John Obert or Jack Anderson.

Q. Did you use the word "goosesteps" in your draft to describe a thought of this kind?

A. No, sir, I didn't.

Q. On Page 23, which continues The Private World of Willis Carto, at this point I am ignoring the Yockey article and talking entirely about the article which you wrote about Mr. Carto.

A. All right.

Q. You have, in the first full paragraph on that page, the sentence "and why did the late Drew Pierson describe Carto as a 'Hitler fan' and claim Liberty Lobby was 'infiltrated by Nazis who revere the memory of Hitler' ". Did you write that?

MR. BRANSON: That is in the appendix. To give you an idea of how this is compiled, Drew Pierson ran columns in which those charges are made, and are set forth in the appendix in the Merry-Go-Round.

Where he said "Liberty Lobby is an organization of the fascist right while Carto, founder of the Liberty Lobby is the big wheel in the neo-Nazi movement, and while the nation has been preoccupied with the Communist menace, a nest of Nazis has infiltrated Washington. The ringleader is Willis Carto".

BY MR. LEE:

Q. Did you consider Drew Pierson to be a reliable and dependable source?

A. I considered Drew Pierson to be an extremely reliable and dependable source.

Q. On what did you base that opinion?

MR. BRANSON: His reputation.

THE WITNESS: He is the founder of the organization for which I work.

BY MR. LEE:

Q. That's a very good reason.

The next paragraph -- oh, incidentally, did you make any effort to determine the names of the particular Nazis who had allegedly infiltrated Liberty Lobby and who were revering the memory of Hitler?

A. No, I didn't.

Q. Can you name any Nazis who have infiltrated Liberty Lobby?

A. No.

Q. The next paragraph, "Why would an attorney who has dealt with him in court say this about Carto". My question is, what attorney said that?

A. That is in the affidavit. The attorney is William Cox.

Q. The statement which is quoted following what I just read, was that from something written by Mr. Cox?

A. No, it was told to me.

Q. The next paragraph. "Why does Scott Stanley, the managing editor of the John Birch Society's American Opinion, say," and then there is a quotation.

MR. BRANSON: If you have complained about it, it is in the affidavit. If you haven't complained about it, it is not in the affidavit.

MR. LEE: Unfortunately, I have to look at the affidavit to see that it contains enough of an answer for me to let it go at that. What page is that?

MR. BRANSON: Page 9. It follows the sequential listing.

THE WITNESS: 15, I think.

MR. BRANSON: No, he is on 9 now. Number 8, rather.

MR. LEE: I see it.

BY MR. LEE:

Q. Did you write the paragraph I've just began to read?

A. No, I did not.

Q. Was any such paragraph or statement included in your draft?

A. It may have been.

Q. Do you know who did write it as it appears here?

A. It comes from Mr. Eringer.

Q. Then, do you know who inserted Mr. Eringer's paragraph in this article?

A. I may have done it. I would have to refer to the draft, but it is very possible that I did.

Q. So, when you say you didn't write it, you are saying it was written by Mr. Eringer, and as far as you know, you simply inserted it; is that correct?

A. Yes.

Q. Do you know what Mr. Eringer's supposed source for this was?

A. Mr. Stanley.

Q. I mean, in other words, was there any explanation as to how Mr. Eringer had supposedly obtained this statement from Mr. Stanley?

A. It was my understanding that he had interviewed Mr. Stanley.

Q. Did you contact Mr. Stanley?

A. I did not.

Q. Did anybody contact Mr. Stanley within the Anderson group?

A. Not to my knowledge.

Q. On Page 23, first column, toward the bottom, you refer to a book entitled "Undercover" by John Roy Carlson.

You refer, more than once in the article, to that book and to some points made in it.

Did you have that book in your possession at the time you wrote the article?

A. That information was inserted by John Obert. All references to that book.

Q. I see. So, just to get you entirely out of that subject area, nothing about Mr. Carlson's book appeared in your drafts?

A. No.

Q. Subsequently to your seeing Mr. Obert's drafts, did you look at the book or discuss this subject with Mr. Obert or anybody else?

A. No, I did not. It is a book from Mr. Obert's library and he saw fit to use it as a source.

Q. The middle column of the three on Page 23, the third paragraph up, there is a phrase used which, I think, appears with the same sort of wording twice here. "After drifting from one right-wing group to another, he decided to organize a lobby for patriotism," et cetera.

Did you write the words "after drifting from one right wing group to another"?

A. I don't recall if I used those particular words. It would be in the affidavit on Page 11.

Q. It appears that Mr. Cox was the source of that idea, to some extent. Top of Page 11.

A. That's right.

MR. BRANSON: I think, Mr. Lee, you're attributing the source to the wrong quotation. The source follows the quotation. So, Mr. Cox, on Page 11, whose declaration is the source for the quotation on Page 10.

MR. LEE: I see.

BY MR. LEE:

Q. Turning to Page 23, toward the --

MR. BRANSON: May we take a break for two minutes?

MR. LEE: Yes.

(Short recess).

MR. LEE: Counsel have just had a discussion and agreed that because so many of Mr. Bermant's answers to my questions

here are to be found in the affidavit of Mr. Bermant which has just been supplied to me today, Mr. Bermant will appear, if necessary, at a future date for supplementary deposition if I feel that it's necessary, after I study his answers and compare them with the answers in the affidavit.

It has been suggested that this deposition take place, if it needs to take place, on the same date as the deposition of Mr. Obert. Is that approximately what we agreed to, Mr. Branson?

MR. BRANSON: Yes, subject to the date of the deposition, depending on Mr. Bermant's schedule. But obviously, we can work something out.

THE WITNESS: What is the date?

MR. BRANSON: September 1.

MR. LEE: We will continue, then

BY MR. LEE:

Q. Page 25, third column.

A. Yes.

Q. Just above the break in the middle of the page. Another quotation attributed to Scott Stanley. Did you write that portion of this article?

A. That was written from information supplied to me by Robert Eringer.

Q. Did Mr. Eringer tell you where he got this particular statement?

A. As before, from an interview with Mr. Stanley.

Q. Did you contact Mr. Stanley concerning this quotation?

A. I did not.

Q. Turning to Page 27, the passage in the middle of the middle column about Mr. Carto, did you write the statement that Mrs. Carto still travels on a West German passport and so forth?

A. Yes, I did.

Q. On what did you base that statement, please?

A. To the best of my recollection, it was supplied to me by William Cox who deposed Mrs. Carto and supplied me a copy of that deposition. It was from Mr. Cox or directly from that deposition.

Q. Just before that, if you look, you will see a statement, referring to Mrs. Carto and I would like to ask you, who said that she is called Eva Braun behind her back?

A. That may have come from Mr. Eringer or from Mr. Cox and/or from Mr. Cox.

Q. Do you recall, more specifically, from which one it came?

A. No, I don't.

Q. By the way, did you ever speak with Mrs. Carto?

A. No, I didn't.

Q. Or did you ever communicate with her in any way?

A. No, I didn't.

Q. Did you ever communicate with Mr. Carto?

A. No, I attempted to. I made repeated requests to Mr. Bartell. Mr. Bartell indicated to me, during our interview, that he throught that Mr. Carto may be available for an interview. I made several requests after that point.

Up to that point, I did not try to contact Mr. Carto because in everything that has been written about him, it says that he is reclusive and it says he does not like being interviewed.

Q. Page 39, starting at the bottom of the page, first column in 39. I quote: "Carto once instructed Sarah Shields Jobe to assemble a 'KKK kosher conservative Congressman.' KKKc file that listed secret organizations to which certain Congressmen belong. It then goes on to say that Sarah Jobe defected, turning over several Carto files to columnist Jack Anderson's reporters.

Did you write that paragraph?

A. I believed I did, yes.

Q. On what did you base those allegations?

A. On the True Magazine piece that is on Page 43 of the affidavit. That passage is cited.

Q. Do you recall, by the way, how True Magazine came to be in your hands, assuming that it was physically in your hands, in order to prepare this article?

A. I believe I got it from a source from a library somewhere.

Q. Did you ever have the particular issue of True Magazine?

A. No, I just had a copy of it. A copy of the article.

Q. I will ask you the same question as to whether you wrote the item and what your source of it was for the following paragraph, "Outraged over whistleblowing which refers to lie detector and voice stress test," and somebody has written "each new employee must now sign that they are willing to a take such any test at any time."

A. Yes, I wrote that. The source of that is Bob Bartell. If your would like to show me the transcript, I could pick out the passage.

Q. That won't be necessary. I can find it?

A. The word "whistleblowing" was not used.

Q. Did he say that "refusal constitutes grounds for dismissal"?

A. He did.

Q. How about, a little further down that column, "Liberty Lobby often hires outside consultants to conduct interviews with Carto watching through a one-way mirror"?

A. That material came from Mr. Eringer.

Q. Did you ask Mr. Bartell about the one-way mirror?

A. No, sir, I didn't.

Q. Turning to the third column on Page 39, what evidence was there, as far as you were concerned, that Liberty Lobby, in 1970, had been planning to establish a right-wing military dictatorship?

A. That information came from the Anti-Defamation League.

Q. Did you ask Mr. Bartell about this supposed plan?

A. I don't believe I did. I may have, but I don't recall.

Q. Well, here, -- did you write this paragraph, the one that describes the project survival?

A. I believe I did.

Q. And there I see you've mentioned Bob Bartell as the person asking for help in raising the money. Looking right at the bottom of 39 and the top 41, what was the source of the story about Mr. Carto becoming angered about a deprecation of the military?

A. That's the confidential source in which you have the exhibit. You showed it to me earlier, the first confidential source.

Q. Middle of the first column on Page 41, "Others feel Carto is consciously attempting to emulate their Fuhrer." What others feel that? Take your time to read the whole section.

MR. LEE: Let the record show that Mr. Bermant is consulting his affidavit.

THE WITNESS: It quotes on Page 30 of the affidavit, Page 31. Tending to supporting that, as does the following quote and the quote that follows that.

Q. Well, If you could answer the question I was asking you, would you be able to name what other people feel that Mr. Carto is trying to emulate their Fuhrer?

MR. BRANSON: That's what is in the sources.

MR. LEE: All right, if after I read that it is not clear to me. I will ask you again.

MR. BRANSON: Willis Carto was a known admirer of Adolf Hitler. That is one of the quotes.

MR. LEE: To whom is the quote attributed "all he needs is a little square mustache and side-parted hair," said one acquaintance.

Mr. Bermant, do you know that acquaintance was?

THE WITNESS: I don't recall who said that. I believe it to be a confidential source.

BY MR. LEE:

Q. Did you write that statement?

A. Yes. I acquired that statement from a confidential source.

Q. Looking at the top of column two, the first paragraph which begins in that column, "three other characteristics", did you write that paragraph?

A. No, I didn't. That seems to come from the book Undercover.

Q. At the bottom of the second column on Page 41, a freelance reporter for the Spotlight, J. Michael Dunsmore. DUNSMORE, is referred to here.

Did you write that portion of the article?

A. I got that information from Robert Eringer.

Q. I know you've talked about your contact with Mr. Eringer which consisted of receiving something in writing as well as one telephone call; is that correct?

A. Yes.

Q. Did you communicate with Mr. Eringer subsequently to the phone conversation you've described?

A. We had a number of conversations. He came down to Washington at some point. I think it was after the article was published.

Q. Could you describe Mr. Eringer, briefly, for me? Physically.

A. He is tall.

Q. How tall?

A. About six feet. Fairly slender. Short hair and a mustache, brown hair.

Q. About what age is he?

A. 28.

Q. Is he an American, apparently, in terms of his speech or was he English? You said he was living in London.

A. I think he is American.

Q. When you attribute something to him here, are you able to tell me whether or not it was something he spoke to you or whether it was something which he gave you in writing?

A. He gave me all of his material in writing.

Q. Do you still have any of it other than the items which have been produced?

A. No, I don't.

Q. I'm sorry, apparently those items from Mr. Eringer were not produced; is that correct?

A. That's correct.

Q. Did you get from Mr. Eringer the names of any sources who could confirm his allegations?

A. I did not.

Q. By the way, further up on the second column, the paragraph beginning with the dark type, the statement is made that the Spotlight trafficks in sensationalism, character assassination, innuendos and outright misrepresentations."

Did you write that sentence?

A. That sentence, I believe, comes from Mr. Eringer's material and was confirmed by myself. I read the Spotlight, several issues, and I substantiate that statement.

Q. About how many issues did you read?

A. Probably a year's worth, certainly not every word.

Q. How often does the Spotlight come out, do you know?

A. I believe it's weekly.

Q. Can you give me any examples, other than the ones listed here, of articles which would substantiate --

MR. BRANSON: We have a year's worth in my room. I could give you ten hours worth.

MR. LEE: I am asking the question of Mr. Bermant.

THE WITNESS: Not off the top of my head, but if I could look through them, I could point out things that would substantiate this.

BY MR. LEE:

Q. The third column, just a couple of lines beneath the large typed section is the paragraph beginning, "Vincent A. Drosdick, III, at one time assistant editor of the Spotlight". To Mr. Drosdick are attributed certain statements and so forth.

Did you meet with or speak to Mr. Drosdick?

A. No, this comes from Robert Eringer.

Q. So, that would mean that the information beginning with the words "Vincent A. Drosdick, III" and going on down through the following paragraph which ends "just enough time to photograph", came from Mr. Eringer?

A. Yes.

Q. Did you make any attempt, or did anyone else connected with the Investigator Magazine or Mr. Anderson, make any attempt to talk to Mr. Drosdick?

A. I did not. I might add, if I may, that Mr. Eringer's credentials made him quite an impressive source and he is obviously, a professional reporter.

Q. What evidence of his credentials did he give you?

A. The book he had written and some articles he had published, his manner of conducting himself, his style of writing. Nobody gets to write that well without having some training, some background.

Q. Did Mr. Eringer explain to you how he happened to have obtained so much information about Liberty Lobby or Mr. Carto?

A. No, I think he pursued the story.

Q. Was it just a coincidence that he happened to be working on, to your knowledge, the same story you were, or the same subject you were?

A. He had finished his story before I had started mine.

Q. Had he heard, somehow or another, that Jack Anderson or the Investigator was compiling a story on these subjects?

A. No, he hadn't. I don't think he could have. At the time he called, there was just three or four of us who knew that we were doing this story.

Q. Turning to Page 73, first column, the paragraph which begins there, begins with the words "the Spotlight escaped a libel suit," then a little further down, "but Liberty Lobby was fined $11,000 by the Federal Election Commission".

Did you write that allegation?

A. I did not write it. It came from Mr. Eringer and it was, I might add, verified by the Spotlight itself who printed that very story.

MR. BRANSON: By the way, I should tell you that I have read editions of the Spotlight after the article was published that have twice said the same thing. The FEC has fined Liberty Lobby $11,000.

MR. LEE: That should be easy to determine.

MR. BRANSON: My point is not whether I attached court papers to my motion to dismiss which made it clear that the FEC had gone to court and asked the court to impose the fine. My point is that the Spotlight, itself, has published the same thing that you're complaining about in this suit.

MR. LEE: I am not sure they have.

MR. BRANSON: I have read it twice in 1981. There is one here that they had before they published which we cite in here which says --

MR. LEE: Before you quote it, what are you citing? I would rather get Mr. Bermant's testimony.

MR. BRANSON: June 4, 1979, the issue of the Spotlight 23, currently the FEC is demanding that the Spotlight and Liberty Lobby pay an $11,000 fine for the no no of telling the truth about Jimmy Carter."

That was 1979. But I have seen it twice in 1981.

MR. LEE: I don't think you will ever find them saying that they were fined because they weren't fined.

MR. BRANSON: But you all have said they were.

MR LEE: We'll look at the paper and find out.

Since this has come up on the record, I am denying that the Spotlight could have published the statement that it was fined, that it or Liberty Lobby was fined $11,000, because there was never, to my knowledge, any fine paid or any fine legally due.

MR. BRANSON: Wait one minute and I will get it for you.

(Short recess).

BY MR. LEE:

Q. The sentence in the first column of Page 73 which begins, "In sum, the Spotlight's performance record for its persuasive evidence that Willis Carto does, indeed, 'use lies and half truths' to win the support of the politically ignorant."

Did you write that, Mr. Bermant?

A. No, I didn't, but I believe it to be substantially true.

Q. Do you know who wrote it?

A. John Obert.

Q. Did you read Imperium yourself?

A. I read several hundred pages of it and I read the introduction in its entirety.

Q. You read the first seven hundred pages?

A. Several hundred.

Q. Do you mean you read the first several hundred or did you skip?

A. No, I read it at random.

Q. Looking back at the manuscripts, the drafts, the first one I happened to look at all closely was a single sheet, Exhibit 7. The passage concerning Sarah Jobe taking files and giving them to Jack Anderson's reporters, did you write that section? I don't recall that we finished that conversation.

A. Yes, I did.

Q. What was the source of that?

A. The source is in the affidavit on Page 43. It is True Magazine and that passage is quoted.

Q. Did you make any attempt to contract Sarah Jobe?

A. No, I did not.

Q. I'm looking at Exhibit 14 which you identified as your own draft of one of the articles.

Could you look at it again, now, please, and tell me is this your draft of the Yockey article or the Carto article?

A. This is my draft of the Yockey article, but this is the one that has Mr. McGaw's editing remarks on it.

Q. By the way, where did you get the information on which the statement is based that Yockey killed himself and died with SS-style boots on? I am referring to the boots.

A. That was, I believe that came in the National Review. I believe that information came from more than one source.

Q. Could you please look at this item which is headed "Willis Carto: Patriot or Fascist". What I am trying to do is to find your draft.

A. It doesn't exist.

Q. So, there is no first draft -- no draft by you at all of the article on Mr. Carto?

A. No, there isn't.

Q. Why is that?

A. The same reason there is no draft of Mr. Eringer's. It has been mislaid or thrown out.

Q. Do you remember when you last saw it?

A. Several months ago.

Q. What I want to do is determine what changes were made in your article about Mr. Carto, and I don't see how we can do that except from your memory, unless we have a copy of the draft.

Can you look at Mr. Obert's draft, which is exhibit -- apparently Obert's draft of the Yockey article is Exhibit 13. It is, also, Exhibit 15.

A. I can answer specific questions from memory, but I can't tell you every way that the articles were changed.

Q. How were these drafts of articles stored or filed and by whom?

A. When I finished an article, I generally put all the material that pertains to that story in a folder and put the folder in my desk somewhere. In this case, there were volumes of material, and they tended to become a little more scattered, but I kept most of the pertinent information in a folder in one of my drawers.

Q. When you did these drafts, would you make a copy of them, either with carbon paper or subsequent to typing them?

A. Never with carbon paper. I would usually make them with the Xerox when I was finished.

Q. Did you give anybody else copies of your drafts?

A. No, I didn't.

Q. So, there is no way you can account for the fact that all your drafts of the Carto story are now gone?

A. No.

Q. Would you please look at Exhibit 13, which is described by you as Mr. Obert's draft of the Carto story?

A. Yes.

Q. That's not the one which has Mr. McGaw's editing remarks.

A. Yes, it is.

Q. I have Exhibit 15 as the one with Mr. McGaw's remarks.

A. That's incorrect.

Q. So, it's the other way around?

A. Yes.

Q. I want to give you the one which is without Mr. McGaw's remarks. Is that it?

A. Yes.

Q. Would you please go through there and tell me, Number 1, where you think substantive changes were made from your article and, Number 2, whose writing, if you can identify it, appears on this article?

A. I'm not sure what you want me to do and I am also not sure why you want me to do it.

Q. I want to see if you can tell me, in order to provide evidence as to the thought processes of the people that prepared this article, what changes were made by Mr. Obert and other people, from the draft which you had written? Since we don't have your draft, we can't do it except from your memory and Mr. Obert's memory, and perhaps other people.

So, I would like you to look at it and read it, and tell me if you recall where Mr. Obert deleted things which you had written and what sort of things he left out and what things he put in.

A. He reorganized the material completely. That is what I am saying. So, it is very hard to say that. He just reshaped it. He wrote his own introduction. He added references to Undercover.

He did not change anything substantially or factually; he just rearranged it and change the emphasis. There was no point where he took a point where I said one thing and then said an opposite thing.

There is no area where he gave emphasis to a phrase that did not deserve that emphasis.

Q. Well, if you're finished with that part of your answer, could you look through it and tell me if you recognize who wrote the various changes into this by hand?

A. Oh, all right. I can do that easily enough.

Q. Assuming you have any evidence on which to base it.

A. This is my handwriting. Well, I will start at the beginning.

Q. If you could identify it by page and then byline. We will understand where you are.

A. Page 3, I changed "those views" to "his message".

Page 4, I changed "but" to "and".

There are corrections in spelling and grammar which really, you probably are not too interested in.

Q. No.

A. It appears to be Page 8, I omitted a phrase pertaining to Colonel Curtis Dall that he was once married to Anna Roosevelt, daughter of Franklin and Eleanor. That phrase may have been restored. These pages aren't even numbered.

Page 10, I added "any more" to "Carto does not speak in public", and I changed "if we are to believe Spotlight managing editor Jim Tucker", to "according to Jim Tucker".

The next page, I added a clause in reference to the American Mercury which Carto acquired in 1966 I added "and sold in 1979".

Page 13, I can give a reason why my original draft doesn't exist because this is part of my original draft. Some of these pages are from my original draft.

What Mr. Obert apparently did is incorporate parts of my original draft and threw out parts that he didn't use. He actually used pages from my original draft in here.

Q. Does he look as if he cut them up or that he inserted whole pages?

A. This is mine. I can tell because of the way I numbered my pages.

MR. BRANSON: I found it.

MR. LEE: Off the record a minute.

(Off the record discussion).

By MR. LEE:

Q. You can go ahead and continue.

A. Page 14, I recommend that one passage be cut. "He fully recognized the political danger in such a proposal," to "it either would kill the other off or at least harm it very gravely." I only recommended that be cut because it was not exclusive material. That paragraph was included in the final draft in the published article.

Page 14, at the bottom --

MR. LEE: There are two Page 14s apparently.

THE WITNESS: I changed Mississippi White Person's Council to White Citizen Council". I don't know why. It is probably because citizen is correct and persons is not.

Page 18, I added a clause to Bob Bartell's quote, "Bartell said Pierson 'did us a disservice by dying'." I added the passage, "out from under the suit." That was cut from the final draft.

Page 18, or another Page 18, whatever, there is a reference to "lawyer Cox". It is the first reference to Mr. Cox. So, I changed it to "California lawyer William Cox".

At some point, I added the phrase, "they would" and I added "make the holocaust a matter of judicial record". That was to flush out a sentence.

This quote has to do with Sarah Shields Jobe. It reads, "Disturbed by what she saw as the potential for blackmail, she defected". I added "spiriting the files away and" then it picks up "turning over several of them to two of Jack Anderson's reporters".

Q. Is that the way it appeared?

A. I don't know.

Q. What was the basis of your saying that she spirited the files away?

A. It was a descriptive word.

Q. What fact was it based on?

A. On the true article. You could say carrying the files away or toting or any number of words.

MR. BRANSON: In the true article they used the words "she carted off".

MR. LEE: Thank you.

THE WITNESS: Page 24 --

MR. BRANSON: Did you all see what was actually in the article?

MR. LEE: Yes.

MR. BRANSON: All right.

THE WITNESS: I recommended the reference to J. Michael Dunsmore be cut. It was not.

By MR. LEE:

Q. Why did you recommend that?

A. I don't recall. I thought it added -- I don't recall. Perhaps for space.

Q. I believe you said that came from Mr. Eringer.

A. Yes.

Q. Do you recall anything that he told you about J. Michael Dunsmore?

A. No, I don't.

Q. Did he imply to you that he had ever worked for the Spotlight or been a writer?

A. No, he did not.

MR. BRANSON: By that you mean Eringer?

MR. LEE: Yes.

THE WITNESS: No.

BY MR. LEE:

Q. In other words, you did not talk to Dunsmore?

A. No.

Q. All right.

A. Next page, I changed ths spelling of Greggalman. It has two Gs.

On the following page, it was referring to Yockey, the phrase "Yockey had to have the first volume printed by Vanity Press". I changed it to read "Yockey had to have it printed by two different small publishing houses".

I recommended that the following passage be cut. I think it probably was. I don't know. That's it.

Q. Does anybody else's writing or markings appear?

A. John Obert has apparently made some corrections, mostly grammar and punctuation.

Q. Anybody else?

A. Not on this copy.

Q. Judging from what you've said, the draft you've just been reading from is the only draft we have of the Carto article, except for the one shown in Exhibit 18, which is, apparently, the version sent to the printer; is that correct, as far as your recollection goes?

A. There was probably no version between this and that. It was probably rewritten and pencil edited by Jack Anderson. Then, from that version, retyped by Opal Ginn and I am certain once Opal finsihed with it, she threw it out.

Q. You said it would have been highlighted in what?

A. Just pencil edited. He would have gone over and changed certain passages.

Q. Why would the version of the article numbered Exhibit 15 have survived, to your knowledge, if the versions that were edited by Mr. Anderson, and perhaps others, disappeared or were thrown away?

A. I kept copies of articles. I tried to keep copies of every

stage of the articles. I always, when something was sent to New York, I kept a copy of that myself.

Q. Is it the ordinary practice in Mr. Anderson's establishment, that once an article is sent to the printer, that the manuscripts are thrown away?

A. There is generally no process because we have never published a magazine before. We were working out of procedure at that point.

When I mailed a manuscript to New York, I kept a copy just in case it was lost in the mail or ripped up or the typesetter's dog chews it up or something. I tried to have a backup copy at all times. I didn't see it necessary to always have backup copies of first drafts because that is not counted.

Q. Did you ever ask any person ot make an attempt to verify something which you had received from another person or another source?

A. I never asked any other person to verify it. I verified it myself.

Q. As far as you know, was anybody, other than yourself, ever assigned to Mr. Anderson or Mr. Spear, or anyone else connected with the Investigator, to independently verify the statements which you had written in your draft?

A. Not to my knowledge.

Q. Same question for Mr. Obert's draft?

A. No.

Q. Was anybody ever --

A. No, not to my knowledge. I might add I had no knowledge of what Mr. McGaw was doing in his Texas office.

Q. I was just going to ask you if you had any contacts with Mr. McGaw during the period in which you were preparing and writing the article?

A. No, I didn't. There was one point of indirect contact where Mr. McGaw, who is listed as editor, made a contract with a freelance writer journalist in California and he had agreed to buy this story and agreed to make it into a cover story and had mailed us a copy of this article which had to do with the shift of code manuals.

I was given the article to verify it, to verify its authenticity, its believability, and I found it to be absolutely absurd. I didn't have to make three phone calls before I found it was full of holes. I made that report to Opal and Jack and they reported it to Mr. McGaw.

Q. Did you have to account at all to Mr. McGaw during your period of studying and writing -- studying the background and writing the articles that we're talking about?

A. No, I didn't.

Q. I want to make it clear. I want to ask you if you had to account or report to Mr. McGaw at all, during the period you were researching and writing the articles?

A. No, I did not.

Q. So, was there anyone other than Mr. Spear or Mr. Anderson to whom you were accountable or responsible?

A. Opal Ginn.

Q. What is her title and status, exactly?

A. She is the chief of staff, administrative assistant, chief cook and bottle washer of the office. She is in charge of everything.

Q. What is the name, officially, of Mr. Anderson's Washington operation?

A. Washington Merry-Go-Round.

Q. Is that a corporation?

A. I don't know what the status is of corporations or anything.

Q. Is everybody involved in that?

A. The Washington Merry-Go-Round, I am sorry, is the name of the column. The name of Anderson's media conglomerate, if you will, would be Jack Anderson Enterprises.

Q. At the head of that is Mr. Anderson?

A. Right.

Q. Who is second in command?

A. Opal Ginn.

Q. How does Mr. Spear fit into that?

A. He is only slightly less than equal with Opal. He has a policy-making voice. He is managing editor of the column.

Member of the board of directors. It is not a really very formal titled operation we have.

Q. During the period you were researching and writing this article, until the time it was finished or when you turned it in to the editor you had to report -- was that Mr. Spear?

A. Yes, sure. I didn't report to him directly in that I didn't tell him what I had learned because my procedure, those days, was to arrive in the morning, hole myself in the office, be wired to the telephone for eight or nine hours and then leave. Sometimes I might run downstairs and take a break or tell someone that I had done something, but they all knew what I was doing and for the time I was writing this article, I was simply writing the article.

Q. During that period you were an employee of Jack Anderson or his company?

A. Correct.

Q. Did you have any contact with Mr. Bill or William Adkins?

A. Mr. Adkins is president of the company.

Q. Which company?

A. The Investigator Publishing Company and he was in El Paso. I didn't have a lot to do with him. No, I guess I didn't really talk to him at that point.

Q. Well, subject to our understanding that if the affidavit doesn't fully cover some of the questions to which I was referred, we can return. I don't have any more questions at this time. Does Mr. Branson have any questions?

MR. BRANSON: No, thank you.

MR. LEE: Thank you very much Mr. Bernant.

(Whereupon, at 4:35 p.m., the taking of the deposition was concluded.)

CERTIFICATE OF DEPONENT

I hereby certify that I have read the foregoing Pages 4 through 135 of my deposition testimony taken in this proceeding and with the exception of changes and/or corrections, if any, find them to be a true and correct transcription thereof.

CHARLES BERMANT

9-22-82

Date

CERTIFICATE OF NOTARY PUBLIC

Subscribed and sworn to before me this the 22nd day of September, 1982.

NOTARY PUBLIC IN AND FOR
THE DISTRICT OF COLUMBIA

My commission expires:

CERTIFICATE OF NOTARY PUBLIC

I, Patricia N. Locke the officer before whom the foregoing deposition was taken, Pages 4 through 135, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me and thereafter reduced to typewriting under my supervision; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties of the action in which this deposition was taken, and, further, that I am not a relative or an employee of any attorney or counsel employed by the parties thereto nor financially nor otherwise interested in the outcome of the action.

PATRICIA N. LOCKE
Notary Public in and
for the District of Columbia

My commission expires:
June 30, 1984

WITNESS: Charles Bermant CASE: Liberty Lobby, *et al.* v. Anderson, *et al.*

Please note any errors and the corrections thereof on this errata sheet. The rules require a reason for any change or correction. It may be general, such as "To correct stenographic error," or "To clarify the record," or "To conform with the facts."

Page	Line	Correction	Reason for Change
8	14	"Pollenhoff" should be "Mollenhoff."	To correct stenographic error.
13	1	"Time" should be "type."	To correct stenographic error.
13	14	"McCun" should be "McCune."	To correct typographical error.
15	7	"Atkins" should be "Adkins."	To correct typographical error.
19	3	"McCun" should be "McCune."	To correct typographical error.
22	11	"Article" should be "letter."	To conform to the facts.
29	11	"Apple" should be "Appel."	To correct typographical error.
34	14	"McCun's" should be "McCune's."	To correct typographical error.
34	16	Change "a blood deposit" to "blood as deposit."	To conform to the facts.
35	7, 11 & 15	"McCun" should be "McCune."	To correct typographical error.
38	17	"Pititclerc" should be "Pettitclerc."	To correct typographical error.
39	3	"Pititclerc" should be "Pettitclerc."	To correct typographical error.
45	3	"Apple" should be "Appel."	To correct typographical error.
46	2	"Apple" should be "Appel."	To correct typographical error.
47	9	Change "The duties" to "One duty."	To conform to the facts.
56	11	"Torrence" should be "Torrance."	To correct typographical error.
65	17	"Sewell" should be "Suall."	To correct typographical error.
66	11, 20 & 22	"Sewell" should be "Suall."	To correct typographical error.

Page	Line	Correction	Reason for Change
67	2, 14	"Sewell" should be "Snall."	To correct typographical error.
69	2	"Investigator" Reporter should be "Investigative Reporter."	To correct typographical error.
76	9	"Article" should be "art."	To correct typographical error.
79	19	"Anatomy of a Sane Man" should be "Anatomy of an Insane Man."	To correct typographical error.
80	7	"Patriate" should be "Patriot."	To correct typographical error.
86	10	"Mr. Spear headed" should be "He spearheaded."	To conform to the facts.
93	10	"Or" should be "and."	To conform to the facts.
95	15	"Torrence" should be "Torrance."	To correct typographical error.
99	19	"Pierson" should be "Pearson."	To correct typographical error.
100	2, 12, 14	"Pierson" should be "Pearson."	To correct typographical error.
127	5	"Pierson" should be "Pearson."	To correct typographical error.
128	3, 5	"True" should be capitalized.	To correct typographical error.
129	12	"Greggalman" should be "Gregg Allman."	To correct typographical error.
131	4	"Out of procedure" should be "without a (standard) procedure."	To clarify the record.
131	8	"Chews" should be "chewed."	To correct typographical error.

CHARLES BERMANT

District of Columbia
Subscribed and sworn to
before me this 16th day
of September, 1982.

Notary Public

My Commission Expires November 14, 1984.

APPENDIX K
DEPOSITION OF WILLIAM COX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC., WILLIS A. CARTO,	*Plaintiffs,*	
v.		No. 81-2240
JACK ANDERSON, et al.,	*Defendants.*	

Deposition of WILLIAM COX, taken at 1950 Sunset Boulevard, Los Angeles, California, commencing at 10:10 A.M. on Thursday, October 14, 1982, pursuant to Notice.

APPEARANCES OF COUNSEL:

For Plaintiffs: FLEMING LEE
BY: G.G. BAUMEN, ESQ.
300 Independence Avenue S.E.
Washington, D.C. 20003

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EXHIBITS

None

LOS ANGELES, CALIFORNIA, THURSDAY,
OCTOBER 14, 1982 10:10 A.M.

WILLIAM COX,

called as a witness, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. BAUMEN:

Q. Would you state your name.

A. William John Cox.

Q. What is your business or occupation?

A. Attorney licensed to practice in the State of California having my primary offices at 708 Gladys Avenue in the City of Long Beach, California.

Q. Before we proceed on there, I would like to just say, in the nature of the deposition, this is pursuant to Rule 30, and under Rule 30 of the Federal Rules of Civil Procedure.

Also I'd like to point out, so that we may have some indication in the record, that the purpose of the discovery in this deposition is as follows: This is an action for libel in connection with material that was published in the October 1981 issue of the Investigator magazine, which is published by Jack Anderson. One of the articles was published by Charles Bermant, B-e-r-m-a-n-t.

The deposition of Charles Bermant was taken, and he also filed an affidavit in that action in regard to statements which were in the article in the Investigator magazine.

In the deposition and in the affidavit, reference is made to Mr. William Cox, an attorney in the Los Angeles area, as the source or one of the sources for some of the statements which he made in the article in Investigator magazine.

And the purpose, therefore, of this discovery is to ascertain any information that is available concerning the source of the material which is claimed was provided to him by Mr. Cox.

Now, Mr. Cox, since you are an attorney, there's no need for me to explain the nature of a deposition, because you're knowledgeable of that?

A. By way of preface, I think we should also state though that there is an action pending in the Superior Court of Los Angeles at this time involving the Liberty Lobby, Willis Carto, as named defendants, and at the present time you are the attorney of record representing generally those organizations that are named as defendants in that, and that I formerly was the attorney representing the plaintiff in that matter, and that I am no longer the attorney of record, in that I substituted out about two months ago.

Q. That's fine.

A. Thank you.

Q. Except that I don't think Mr. Carto has yet been served, or at least I'm not aware if he has been in that action, but all the rest of the statement is accurate.

Let me go back. You formerly were in the justice department, were you?

A. I worked for the Law Enforcement Assistance Administration in the justice department in 1970 -- the latter part of 1973 and the first part of 1974.

Q. And after that, what work did you do?

A. I was a deputy district attorney for the County of Los Angeles for three years prior to entering private practice five years ago.

Q. And prior to either of these duties, what was your occupation?

A. Prior to -- well, chronologically -- let me go back to the beginning.

In 1962 -- I think that's early enough -- I became a police officer for the City of El Cajon, and was a police officer there for five and a half years. I was an investigator the last year that I was there. From 1968 I made a transfer to the Los Angeles Police Department, and I was there for five and a half years.

During the last four and a half years that I was there, I was primarily a writer and policy analyst. I wrote the Los Angeles Police Department policy manual, including the policies, principles and philosophies of that department.

And while there, I also served as a consultant on the staff of the National Advisory Commission on criminal justice standards and goals, where I researched and wrote the chapters dealing with the role of the police in America.

Following that, and law school which I was doing at the same time, I left the Los Angeles Police Department, and that's when I went to the Law Enforcement Assistance Administration as an expert in law enforcement and served in various administrative capacities there prior to coming back and being a deputy district attorney.

Q. You've had experience as an Investigator then?

A. Yes.

Q. Did you, sometime in the middle of June 1981, contact Mr. Jack Anderson's office in Washington?

A. I think it may have been a little bit earlier than that. I made my first contact by telephone. I don't recall who I spoke with there.

Q. Did you ultimately speak to Charles Bermant?

A. Yes, I did.

Q. You recall approximately when you spoke to him?

A. I spoke to him on the telephone. I was in Washington, D.C. on the weekend, approximately June the 21st. However, that falls around a weekend there.

And I did, in fact, meet with him while I was in Washington, D.C.

Q. What was the purpose of your contacting Jack Anderson's office?

A. To obtain information. I was conducting -- I was directing my own investigation in this case, and one of the things that I was attempting to do was to identify the various organizations that were associated with Willis Carto and the Liberty Lobby.

There was a dearth of information that was available generally, and one of the places that I was going were to various journalists who had covered Willis Carto in the past in an attempt to get information.

Q. Did you meet with any of the journalists other than those in Mr. Anderson's office?

A. I had met with other journalists, but I would have to decline to mention those, because they're not relevant, and the information is privileged to a certain extent --

Q. Did you inform Mr. Bermant that you were conducting an investigation of Mr. Carto and the Liberty Lobby?

A. Yes, I did.

Q. And had you then been conducting an investigation of Willis Carto and the Liberty Lobby?

A. Yes.

Q. How long had you been conducting such an investigation?

A. Well, the lawsuit was filed in February, I believe, of 1981, and the investigation began at about that same time.

Q. And just what was the nature and extent of the investigation?

What was done?

A. Well, again I would have to say that most of that is privileged. It was an investigation that was designed to primarily identify that which was a matter of public record, that which was written and that which had been documented in the past from various journalistic and governmental sources.

Q. Did you ever interview Mr. Carto?

A. No, I did not. He was served -- he was served to appear for a deposition in Washington, D.C.

He was supposed to have appeared on May the 21st for a deposition. He did not appear.

Q. Have you ever met him?

A. I have never -- well, I may have met him once. I attempted to personally serve Willis Carto in November of 1981 at the I.H.R. Convention, at the Hacienda Hotel next to the L.A. Airport.

I contacted that man who denied he was Willis, but had the general demeanor of Willis Carto as well as I knew it.

I was not able to identify that man as Willis Carto. My understanding was that Willis Carto ran out of the kitchen in order to avoid being served.

Q. This trip to Washington on the 21st, was that in relation to the investigation that you say you were --

A. Yes.

Q. And was that something that you paid for yourself, or was it paid for by others or contributed to by others?

A. Well, it's a very complex question. The costs were being provided at that time, in a general sense, by my client, Mel Mermelstein.

Q. Any other persons or entities provide you with any costs in connection with the investigation of Liberty Lobby or Mr. Carto?

A. No.

Q. All right. You told us you met with Mr. Bermant sometime on that weekend of June the 21st.

A. Well, I'm going to qualify the question. At a later time, much later, there was a sum of money received from hundreds of individuals, small contributions and so forth.

But at that point, there were no contributions fr. a any other source other than my client and myself.

Q. Well, were those contributions in relation to the lawsuit that you were conducting for Mr. Mermelstein; is that right?

A. Yes.

Q. That would not specifically be for the investigation of Willis Carto and Liberty Lobby?

A. No. No one ever dedicated funds specifically for that purpose.

Q. You met with Mr. Bermant about the 21st of June?

A. Approximately.

Q. All right. And did you provide him with some information at that time?

A. Yes, I did.

Q. Can you tell me the nature of the information you provided him?

A. I provided him with information, and I can't recall specifically what I provided him. However, I can provide the specific limits of that information. I provided him nothing that was not already on file with the Los Angeles Superior Court.

Q. I see. Then it would be correct to say that you provided him possibly with documents that had been filed in the course of this Mermelstein case?

A. Yes, that's true. But the documents I provided were available to any person who would go to the courthouse and purchase a copy of it.

Q. I think Mr. Bermant has indicated in one of his statements that you provided him with a copy of a declaration of yours that was dated August the 10th, 1981 which was regarding your proceedings.

Do you recall giving him a copy of such a declaration?

A. Well, that would have obviously been at some point after August. I don't specifically remember doing that, but I'm saying I met with Mr. Bermant, I think, and I'm fairly sure of this, at a later time in Washington when I was there on another trip.

Q. I think you indicated you met with him again in July, about July the 19th, and at that time he met with you at the Hyatt Hotel and spent possibly lunch together and maybe a couple of hours in the afternoon in your room going over the material.

Do you recall that?

A. Generally, yes.

Q. Do you recall that he showed you a draft of some story which he was writing for the Investigator magazine?

A. At some point, I did see a draft.

Q. I see. Now, there was an article -- I mean there was a quotation in this Investigator magazine on page 23, which Mr. Bermant in his deposition states was received from you.

And I'll read it to you, quote -- referring to Mr. Carto:

> "Everything he does seeks to destabilize society. His (misspoken as survivor) panic mailings, survivor-group propaganda approach creates a climate of fear and danger and it is only within such a climate will he be able to seize the real political power he seeks."

Do you recognize that as a correct quotation of anything which you may have stated to Mr. Bermant?

A. Well, I recognize it as being a general sense of what I said to him in terms -- the survivor-group mailing doesn't quite ring true, in that I don't think I would have said it exactly that way.

But generally that is a statement that I -- that I did make, and would stand behind.

Q. Thank you.

A. Except that if -- is there going to be any more questioning on it? If so, I need to explain the answer.

Q. I wish you would explain it, because I would like to know the basis for your statement there and the --

A. If I can have it in front of me. I think it's important to recognize that a statement like this obviously does not -- first off, Willis Carto is a public figure.

For many years he's been involved in public activities. I am not, of course, referring to Mr. -- every activity of Willis Carto. I'm not saying when he goes to the bathroom or out with the boys at night he's seeking to destabilize society.

It has to do with his connections with the Liberty Lobby and the other various organizations that he directs. In that context, when read together with the statements that he has made in conjunction with the Imperium that he endorses, that was written by Frances Parker Yockey, and when read in conjunction with all the material he publishes, it becomes clear that what Willis Carto is seeking to do is to fundamentally change our society into one which is not multi-racial and pluralistic and equal to all.

It is a society that he perceives as being primarily a white society based upon a -- based upon a form of government that is world-wide and dominates the world for the fulfillment of the white race.

Q. Where do you find such a basis for this statement?

A. I would direct you first to the Imperium, the book that is published by Willis Carto, and when you read that in its entirety, then if you read the preface that he wrote, in which he totally endorses that which is written in the book, and further if you will read the declaration that he filed in court in conjunction with the motion on summary judgment in the Los Angeles Superior Court, where he again reaffirms that he stands by everything that he said, that he still believes and continues to believe in those premises, then I think that it is a fair statement that he is seeking to change our society as it exists.

Q. Then your basis primarily is the book which you have referred to and also the introduction which he wrote to the book?

A. Well, I think that, and in conjunction with a review of the literature that he publishes.

Q. What specifically have you in mind?

A. Well I can only direct you to a -- to their own advertisements and --

Q. Who is "theirs"?

A. I'm talking about the -- just a second. To the publications that are put out by the Noontide Press and the Institute of Historical Review, both of which are businesses which are in Torrance, California, that operate under the auspices of the Legion for the Survival of Freedom, a Texas corporation.

Q. And there's things in there which you say attribute what you have mentioned in this article here concerning Mr. Carto which you feel support that statement?

A. Well, of course. He's published materials for the Klu Klux Klan, The White Student. He has published a handbook on terrorism, on how to blow up trains.

Q. Give me the book on terrorism.

Do you know the name of it?

A. I don't know the name of it.

Q. How to blow up what?

A. It's like a cook book, a terrorist cook book on how to make bombs, engage in --

Q. Do you know when this was published?

A. No, I don't.

Q. Do you know what firm published it?

A. Noontide Press.

Q. Do you know who is the author of the book?

A. I don't believe it bears an author.

Q. And you attributed that to Mr. Carto?

A. Well, I attribute that to being a publication of an organization that he directs.

I could go on to say when Willis Carto writes under a wide variety of pseudonymns where he does not publish in his own name, he is engaging in those kinds of activities that are very

similar to that of Lenin or to others who see themselves as some sort of an unsung hero who are trying to save society from itself by destabilizing it and changing it into something that he perceives being better for the rest of us.

Q. Would you say that's a result of your own conclusion after reading these various materials which you have referred to?

A. Yes.

Q. You don't have any other source that specifically establishes that other than what you have arrived at from your own investigation which you have just related?

A. Yes. In other words, in summary --

Q. May I see that back.

Thank you. Now, one of the articles in this magazine that is claimed to be defamatory and which referred to Mr. Carto's America -- they have a headline -- America's neo-Nazi underground, which they contend in this suit for libel is false and defamatory and Mr. Bermant in one of his -- in his affidavit quotes as one of his sources, not all of his sources, page 25 of your declaration as being the declaration of August the 10th. And specifically I think -- if I can find the exact thing here -- I think he's referring to the second paragraph there.

A. There were a number of declarations.

Q. That doesn't have the exhibits attached to it -- attachments have not been provided me.

A. Well, if you have this declaration --

Q. Page 25.

A. Just generally, this declaration lays out, in a general sense, my findings -- in other words, in attempting to answer your question a few minutes ago, I would say that this declaration goes far beyond what I just said in trying to explain the overall conclusion about Willis Carto's seeking a different society which will arise only through the destabilization of the present society.

Q. The specific --

A. Specifically as I go through this declaration from page to page, this says far better than what I have said just now the very same thing. Now --

Q. I will cover most of those quickly. But I wanted to try to take the first --

A. Let's go to Page 25.

Q. The first itemization which is in the Complaint contends that this is America's neo-Nazi underground.

Mr. Bermant, of course, is the one who expressed that and the only -- he's not saying that you said it. He's merely stating that one of the sources from which he derived his information was the Page 25 of your declaration which you're just looking at now. And I wonder --

A. If I can have a second.

Q. Sure.

A. Okay.

Q. In the second paragraph, it says:

"Willis Carto organized anti-Semitism in the United States. His dream is to succeed the Fuehrer as savior of the Aryan race in America and Europe."

Can you give me the source of that? Or is that your opinion?

A. That is my opinion.

Q. I see. Did you predicate any of this on the True magazine that there was an attachment, as I indicated? I do not have the full copy of this declaration nor have I ever had it. I've seen it in the courthouse, and I notice there is a 1969, November, copy of True magazine attached to it.

Do you recall the True magazine article?

A. I recall that, and I also believe that a copy of that article was in my possession and I would have to say in an overall sense, that was one of a number of different documents that I was able to find that had in the past covered Willis Carto.

Specifically, in terms of its internal content, I would say no, I'm not basing it on that. I'm just basing my opinion overall on my review of the entire literature and the overall investigation.

Q. Were you aware that an action was brought against the publisher of that paper in the United States District Court in October in 1970, civil case 7197, which is Carto versus Faucett Publications and others in which they paid attorney fees to that article?

A. I became aware of that later on. I don't believe that I was aware of it back in June of 1981.

Q. Did you tell Mr. Bermant that some of your material had been obtained from and was based on information in the True magazine, if you recall?

A. I don't believe so. It -- I don't specifically recall that they were discussing the True magazine article as a fact. I mean we may have. I think -- not specifically, no. I don't believe we ever really discussed that. I can't recall the discussion.

Q. I see. You don't recall ever telling him that to the best of your knowledge, the source -- much of the information was obtained from True magazine?

A. No. I certainly don't believe that's true at all.

Q. Okay. Now, in one of the affidavits of Mr. Bermant here, I think it is Page 8, which he has filed in this -- I believe I've covered this. He says that everything that he does, referring to Mr. Carto, seeks to destabilize society, his panic mailings and such. We just went through that, and that is one of the items that he said was in relation to information he got from you. And we've covered that.

Let's get onto the next one then. There is a statement in the Complaint that after drifting from one right-wing group to another, he decided to organize -- Willis Carto -- a lobby for patriotism. He would call it Liberty Lobby. And this, the plaintiff contends, that the statement was false.

One of the items that Mr. Bermant bases his statement of that is from your declaration on Page 4 and Page 5 -- let's see if I can find it here.

And I'll read from it:

> "After serving as a debt collector for Household Finance Corporation during the 1950's, Carto was or became a director of the Libertarian Congress of Freedom, executive secretary of Liberty Lobby and anti-Semitic group, and formed the Joint Council for Repatriation for the deportation of American blacks to Africa."

And that is found here, at least in part, on Page 4 and 5 of your declaration.

Do you recall that?

A. Yes.

Q. What's the source of that information?

A. I don't recall specifically.

Is there any dispute that he formed Liberty Lobby? In other words, what I am saying is it's kind of a complex question.

This paragraph mentions several organizations and then it says he also formed Liberty Lobby. I don't understand what --

Q. That's not -- the Liberty Lobby isn't the factors that are in concern.

A. You're referring to the organizations before.

Q. That's right.

A. I would have to say that that is just drawn from all the sources. In other words, in drafting that, I used a large number of sources, and I don't recall specifically where that information came from. I will say that I did everything within my power to depose Willis Carto in order to ask him specifically about these things, and he declined to be deposed.

Q. Do you have any information about this organization, Joint Council for Repatriation, any information that it was dedicated to the deportation of Amercian blacks to Africa, any source of that statement?

A. Well, as I already said, I cannot recall specifically from what source that came from. There were a number of different sources that were pulled together in order to prepare that one single document.

Q. May I ask you, in preparing this single document on Mr. Carto and the Liberty Lobby, what efforts did you make to verify the accuracy of the material that you put in here?

A. I hired private investigators in Washington, D.C. who collected all of the available goverment files of the various different organizations of government in Washington that are empowered to preserve such materials and verified, as best I could, those organizations that are still in existence where files are in existence.

One of the things we found routinely or fairly regularly when we would go to those locations, in some cases, the files would be simply missing or unavailable.

Primarily I verified as best I could through all current sources, the statements that I made there regarding existing organizations. When we go back 20 and 30 years, it becomes very very difficult to verify that or check on that, where the person involved refuses to give you any statements or to participate in discovery in order to verify it.

Q. Well, when there was some lack of ability to accurately verify, did you, nevertheless, use the material regardless of the fact that you couldn't completely determine its accuracy?

A. I used it as best I could upon information and belief. Everything that I state there, I believed to be true, to the best of my information at the time I wrote it.

Q. I see. In your introduction of this, you stated that "I am informed and believe and upon the information and belief to declare the following to be true and correct," and that's one of the reasons we're seeking the information, because it is on your information.

I assume it's on your belief. Your information is what we're trying to find so we can determine the basis of it.

And you say you don't have any present memory about the repatriation -- this Joint Council for Repatriation, as being dedicated to the deportation of American blacks to Africa?

A. I have no specific recollection, no.

Q. Next item we have here is in item number -- I guess it's 14 -- of Mr. Bermant's affidavits, he states quotation from the Complaint and from the article in 1968:

> "Another Carto front organization called United Republications for America used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York."

And this is alleged to be false in the Complaint, and Mr. Bermant said he relied on, among others -- there are several sources he relied on. But he relied on Page 2 of your declaration. He states the following:

> "A sub-group of Liberty Lobby and a part of Carto empire is United Republicans of America, which is not a Republican party organization, but is, rather, aimed at a takeover of the Republican Party."

You'll refer to paragraph 2. I think you will find it listed on line 17.

A. Yes.

Q. Can you tell me the basis for that statement that this is an organization aimed at the takeover of the Republican party?

A. No. I can't. For the same reasons. I think the record should reflect though that there are dozens and dozens of organizations involved here, and at the time that I drafted that, it could be that I was relying upon the same other external sources as perhaps Mr. Bermant was. I don't know that for sure.

I don't specifically feel that that was new information to Mr. Bermant and to Jack Anderson, if you understand what I mean. In other words, I suspect that this perhaps confirmed, but of course, it may have confirmed through the same sources. I don't know.

Q. All right. We have a provision in the article which states the following even more to the point; why would a man who says he's not anti-Semitic establish something called the Institute for Historical Review?

"The Institute, an integral part of Carto's West Coast operation, was set up to disprove that any Jews died in World War II gas chambers."

And that, of course, is asserted to be a false statement. And he said that this was, in part, from the declaration of August the 10th, specifically Page 3, which it says:

> "As a fund-raising bulletin issued by the Institute says the main focus of the organization's research and education program has been the debunking of the so-called Holocaust."

Is that the basis you are stating here, that the main focus of the organization's research, is it your contention, that that's published somewhere in the bulletin --

A. Yes, sir. It's quoted.

Q. Do you know what issue of the Institution?

A. Frequently they would issue undated untitled bulletins. And I believe that is an undated untitled bulletin.

From the appearance of it, it appears to be one that came out at the very beginning or the inception of the organization in

which they were attempting to explain what their purposes would be.

More than that, I believe the statement is also substantiated by a review of their published literature, particularly the various journals of the Institute for Historical Review, where the -- almost the entire focus of every single journal is on that very same subject.

Q. There's another quote in here -- I don't know if it's a quote -- but he said he relied on -- I guess that's -- I'll skip a couple of these because we've covered them indirectly. Some of these I think we've covered.

One of the next articles is a Paragraph 23 in which it's stated:

> "In this scrutiny of Willis Carto and what he represents, five of the characteristics of John Roy Carlson said identify inherent or incipient fascism and manifested themselves in greater or lesser degree.
>
> They are a virulant anti-Semitism to dissolve the social fabric, the pitting of group against group and race against race to weaken national unity; incessant red-baiting to smoke screen fascist propaganda; super patriotism and a perverted brand of nationalism; and a creation of a survivor mentality to further fragment society.
>
> "Three other characteristics are also evident in the Carto record; use of lies and half-truths to win the support of the politically ignorant; adulation about Adolf Hitler; denigration of democracy and agitation for an authoritarian new order."

This statement was in the magazine, the Investigator, and that's contended that is false, and Mr. Bermant indicates that a number of sources, one of them he says which he presented indicates is the declaration of August 10th, specifically; he refers to Page 2.

> "The money trees of which Willis Allison Carto is the creator and proprietor constitute a deep but not impenetrable forest, at the center of which is the tangled underbrush of a secret American Nazism."

That's Page 2.

Do you think he was correctly interpreting your language on Page 2?

A. I think it's important to note that it is very likely that the article that is the subject of the litigation was probably almost -- in other words, that article was substantially prepared as early on as June. Now, the fact that there is support for that article here, I don't think is necessarily indicative it was drawn directly from this document.

Q. He doesn't say it was drawn directly. He said one of the sources --

A. It supports it. Now, then, I don't understand what your question is.

In other words, I have written this. Now, you've read several different things. I don't understand what your question is.

Q. What I am getting to in this particular quotation in your declaration, the one I just read:

> "The money trees of which Willis Allison Carto is the creator and proprietor constitute a deep but not impenetrable forest at the center of which the tangled underbrush of secret American Nazism."

I would like to know the source or the basis of that --

A. Again, it's my opinion. That's based upon -- let's try to get to that if I can. See, I have never asserted that Willis Carto was a Nazi. I don't believe that Willis Carto is a part of what we conceive to be the American Nazi movement.

However, if you analyze everything that he has put together, particularly his own brand of absolute socialism that he advocates - -

Q. When you say absolute socialism --

A. I believe those are the words that he himself uses in his preface to the Imperium, if not in the Imperium itself, which he endorses.

I don't recall if it's in the Imperium or his own preface to the Imperium, but the analysis of factors that you yourself read, and I would direct you to the book there.

And he is the publisher of those who purport to be Nazis. The material that he does publish, and again I would direct you

to the list of books -- they say they have hundreds and hundreds of them.

And when you go through and you take it in its entirety, you will find that this is the support for the statement. In other words, the word Nazism has come to take on a meaning. It's more than just those who adhere to the teachings of Hitler. It is a form of government. It's a form of social control.

And in that, that which is advocated by Willis Carto, the Liberty Lobby, and all the other various organizations that he very directly controls is virtually indistinguishable.

Q. Also on Page 25, which we covered earlier, that he leads organized anti-Semitism in the United States. Is that based upon what you told us that is published in his various publishing houses?

A. There are other publishing houses. Liberty Bell Publications in Reedy, West Virginia -- now, if you compare the mailing list from Liberty Bell publications with that of the Noontide Press, you will find the very same books with the very same ad formats.

Now, it's my understanding that Willis Carto in the Liberty Lobby -- there is a falling out between them and Liberty Bell publications. Other than for Liberty Bell publications and Willis Carto for the Noontide Press and Historical Review, there are virtually no other major publishers of this kind of materia] in the United States that I have been able to discover.

Q. Do you say that some of these have anit-Semitism in them?

A. That is the primary focus of most of the literature.

Q. Which particular publications do you specifically have in mind?

A. Well, I will again direct you to their own mailing list. It's extensive.

Q. How are they anti-Semitic? What way?

A. The focus of every single one is to blame the Jews generally for all of the problems of mankind for the last 2,000 years.

Q. Are there some articles like that other than this Imperium book you're talking about --

A. Number --

Q. -- on which Mr. Carto was connected?

A. He's their publisher.

Q. Do you know any specific books that do just that, blame the Jews for almost all the problems for the last 2,000 years?

A. Well, I'll direct you to the books. I mean -- it's been a year. So I really don't have the titles at hand. I don't have that kind of money. I'm not good at remembering specific titles.

Otherwise, I would try to help.

Q. Well there's also another quotation. It is:

"Willis Carto, self-decreed mission to multiply into a majority the number of Americans who share the Hitlerian concern of the niggerfication of America."

Do you know the source of that material?

That's on page 24 and 25.

A. I believe that's out of Imperium -- wait a second. I'm not sure where that came from. I'm not certain where that statement came from.

There is also -- there is -- you have to realize that there is another organization that was formerly, I believe, substantially under the control of Willis Carto before it came into his grasp, and it slipped out of his grasp.

And that was the National Youth Alliance, which was formerly Youths for Wallace. And you go to that, and that's the National Vanguard. That's the publication of that organization.

Q. Do you have any information that Mr. Carto was ever connected with the National Youth Alliance?

A. I have information that at one time he had some control over that organization and then it fell apart.

Q. Do you know the source of that information?

A. Not specifically, no. It was -- Paul Vallentine of the Washington Post published an extensive article about five or six years ago. And in that, he documented to a large extent some of this. Now, I would suspect that that article was one of the sources that I would have relied upon for that.

Q. Did you make any effort to check the accuracy of the sources that were referred to in that article?

A. As best I could, and in the official files in Washington, D.C. we attempted to try and trace those organizations, and it

just begins to fall apart, because frequently there were situations where employees of Liberty Lobby would be used to form an organization, and then would never be an active part of that organization.

So it became very difficult to actually trace the full thread through all those organizations.

Q. We have also another statement which he attributes to you.

"Carto sees his media empire as a means of obtaining political power in order to effecuate his policies of racism."

Do you recall such a statement as that?

A. Is that in my --

Q. That supposedly was in the points and authorities regarding corporate liability dated August 10th, 1981.

A. I assume if it's in the file with the Court, then I said it.

Q. Do you know -- is that something in which you have found elsewhere, or is this something from your own conclusions?

A. I would assume it's a conclusionary statement based upon the overall investigation. But I'd have to look at it a little closer.

Q. Look at it there.

A. I believe that's a fair statement. I don't -- I mean his media empire, the Spotlight newspaper that goes out once a week, his television programs, his radio spot broadcasts seem to be the centerpiece of his entire effort.

Q. You say effectuate his policies of racism. Is that your conclusion or is this something --

A. That's what he says himself. Again I direct you to Imperium. And I direct you to his preface to it.

In other words, it is very clear in terms of the racial eradication of all of those who are not (black or) white.

Q. When was the Imperium written? Do you recall?

A. Well --

Q. Some 20 years ago?

A. Oh, no. It was written right at the end of the War by Frances Parker Yockey. It was written the latter part of 1948, '49 or '50, during that period of time.

Q. So 30 years ago, approximately?

A. Yes.

Q. Do you have any other basis then, other than that article which you indicate was written some time ago, that Mr. Carto sees his media empire as a means of obtaining media --

A. Again, just an overview of the entire investigation. And specifically, any time that we get into that subject of racism, then we have to go to Willis Carto's own words as he endorses the entire book Imperium.

Have you read Imperium?

Q. No.

What do you mean by racism?

A. Well, it appears, from my review of this entire case, that Willis Carto and those who he has around him, sincerely believe that the only race that has any place in the world order are those who are descended from that place in Europe, the pure white northern European race.

And that the power of the future, which will allow mankind to be powerful enough, with a powerful enough army, to go out and conquer space beyond earth, will only be found in the subjugation of all other races other than the great white race.

Q. So when you say racism, you're referring to the fact that -- not the fact, but you're referring to the contentions that the white race is -- anyone who asserts that the white race has some superiority or something of that sort, is a racist?

A. I'm saying that someone who goes to the extent that Willis Carto does to publish that, and to live in that kind of a world where that is their primary focus, is a racist.

Q. Does he publish such as that besides this Imperium? Do you know anything else --

A. I, again, direct you to the reading list of Noontide Press. It's long and extensive and is dedicated to those kinds of subjects.

Q. "And he lives in that type of environment." What do you mean by that? What situation are you referring to?

A. Well, everything that I can see -- you know, I don't read Spotlight magazine or newspaper every week.

But every issue, everything that I have read that has come out of the Noontide Press, and particularly in reading Imperium, I find no other conclusion that's available.

Q. You don't mean physically living. Because he lived down here near the Torrance area. He lived in an area where there were just as many people of other religions and races --

A. I'm talking about his environment in Washington, D.C. He was rarely ever in Torrance. He would fly in for a couple of days, supervise his businesses and return to Washington.

I'm talking about the corner of that particular area in Washington, D.C. where Liberty Lobby is located and where he has his offices surrounding him there, those individuals associated with those organizations, and --

Q. There's another one here I'd like to ask you on.

"At a party given in Carto's honor by the Frances Parker Yockey Movement, guests wore Nazi insignia and sang the Horst Wessel Lied."

That is on Page 11 supposedly of your declaration.

Can you give me the sources of that?

A. I don't recall specifically the source of that. I assume that it was probably from some of the materials that I had reviewed.

Q. Do you recall if that was in the True magazine article?

A. I don't recall. It could very well have been.

Q. You don't recall what efforts you made to determine --

A. I attempted to verify this through depositions. I asked in depositions of Thomas Marcellus, who is the existing director of the Institute, and also David McCalden, the former director, regarding certain individuals.

The one individual, who had been -- I'm really searching now and I'm only going to -- one individual who has been identified in Los Angeles as being a member of both the K.K.K. and the American Nazi party --

Q. When you say K.K.K., what do you mean by that?

A. Ku Klux Klan.

Q. There is another terminology that uses -- other organizations use the same initials, you know.

A. I'm talking about the Ku Klux Klan. I believe there are statements in the depositions that he had visited the offices of the Ku Klux Klan and that --

Q. Is there something wrong in visiting the offices of the Ku Klux Klan in this country of ours?

A. I think that's an argumentative question.

Q. I see. Have you ever visited the offices of the Ku Klux Klan to try to get investigative material from them?

A. I have never been able to locate an office for the K.K.K. or American Nazi party in L.A.

Q. There's another article here that is attributed in part to you. I have a couple of them here.

This is on Page 76:

> "Under Carto's guidance, the American Mercury was turned into a thoroughly scruffy and anti-Semitic magazine."

Can you give a statement whether that is a reasonably accurate quote and whether that -- can you give me the source of the statement, if it is?

A. Again, that is a conclusionary statement based on my own investigation. He took over the American Mercury magazine when he took over the Legion for the Survival of Freedom, and that was back in the '50s, I believe, when he -- perhaps early '60s.

I think '61, '62. He took over the Legion for the Survival of Freedom from General Edwin Walker, if you remember him, who was fired by Kennedy for his right-wing activities in N.A.T.O. in Europe.

He came back and became an extreme right-wing figure in the country and organized a Legion for the Survival of Freedom. Carto took that organization over, and that included the Amercian Mercury magazine at that time.

The magazine, so far as I know, then became simply a propaganda mouthpiece for that particular point of view, where in the past it was a fairly well known and respected magazine.

After that point, I don't believe it had any particular status, journalistically speaking, generally.

Q. Is any other material that you recall that you gave to Mr. Jack Anderson's office, besides the court papers to which you have referred and besides the information that you indicated, was a correct or reasonably correct statement of conversations you had had with Mr. Bermant, which you referred to earlier about "everything he does seeks to destabilize society."

Do you recall any other items you gave to Jack Anderson besides those items?

A. Specifically I'm quite sure that I didn't. I can't be sure. The answer I believe has to be no.

Q. This declaration here on August 10th, 1981 appears to be a compilation of material primarily directed at Mr. Carto and the Liberty Lobby, and the material in here, I gather, was something that you acquired as a result of investigation or research.

Can you tell me any other sources than those you have already given which you used in preparing the material which is in the affidavit -- declaration of August the 10th, 1981?

A. Not specifically.

Q. Did you get any material provided to you by any other organizations with which you have had contact?

A. Well, this is a difficult question to answer. That's why I was being a little reluctant there. Early on we requested assistance from organizations such as the Anti-Defamation League and the Simon Weisonthol Center. We were given no support or no materials whatsoever.

That's one of the reasons why we had to go to the extent that we did to conduct an investigation, including hiring investigators. And much later, in fact, I don't know if it was before this document was provided or put together or after it, I did come into possession of a fact sheet from the A.D.L. It was not directly provided to me by the A.D.L.

I don't believe that it was in my possession at the time that this was prepared.

Q. I see.

A. I believe that the material that is there would support this. In other words, I don't recall that there was --

Q. You mean the material in the declaration would support that information --

A. No.

Q. In the fact --

A. No. The fact sheet would support the information that is here. I don't recall if it's different, but I don't believe I can fairly state that this was predicated upon it. I want to be entirely fair and say that I did, much later on, come into possession of such a fact sheet.

Q. Did you have an opportunity to check out the source of the material in the fact sheet to try to verify any of the material you had in your declaration?

A. Only by reference to -- only by cross-reference to other materials and other findings that I have already represented.

Q. You didn't attempt to ascertain the accuracy of the statements in the fact sheet?

A. Like I said, I didn't rely upon it at all, so I didn't -- in other words, I didn't find that to be my most accurate source. If you see what I am getting at. I did not feel that would be the most accurate source.

Q. What was the scope of your investigation when you undertook it to prepare the material in this declaration?

Was it confined to the records which you said you had investigators check in Washington and the material you had here in California, or did you go beyond those areas?

A. Well, at the outset of the deposition, I went through the whole thing. Then the scope of the investigation --

Q. And besides, you say you employed investigators, that is, professional investigators?

A. Yes.

Q. In Washington?

A. Yes.

Q. Do you employ any in California?

A. Yes.

Q. Did they make reports to you?

A. The investigators in California did not make reports to me.

Q. The one in Washington did make reports to you?

A. Yes.

Q. And you still have those reports?

A. Yes.

Q. I see. And in those reports, without going specifically to them, is there some appearance of an effort to validate or verify the facts which are set out in the report?

A. Yes, there is.

Q. Have you provided any of that material since the time you received it to Mr. Bermant or to Mr. Anderson?

A. I provided it to no other person. Those are privileged, confidential documents that were used for my own purpose.

MR. BAUMEN: There's nothing further. Would you mail the original deposition to Mr. Cox at his office at Gladys Street, 708 Gladys Avenue, Long Beach, and for him to sign, and if he signs it within 30 days, fine.

If not, then you are to obtain the original and mail it without signature. But in any event, after 30 days, the original is to be mailed to the United States District Court in Washington, attention Judge Parker.

MS. REPORTER: Do you want a copy?

THE WITNESS: Yes.

(Whereupon the deposition was concluded at 11:15 a.m.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, WILLIAM COX, do hereby certify:

That I have read the foregoing deposition;

That I have made such changes in form and/or substance to the within deposition as might be necessary to render the same true and correct, but have limited such changes to actual reporting errors or errors in fact, as opposed to editing the context generally;

That having made such changes thereon as were required, I hereby subscribe my name to the completed deposition.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of November 1982, at Long Beach City, California.

WILLIAM COX

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, Dawsha Layland, C.S.R. No. 5166, a Notary Public in and for the County of Los Angeles, State of California, do hereby certify:

That WILIAM COX, the witness named in the foregoing deposition was, before the commencement of deposition, duly sworn to testify the the truth, the whole truth, and nothing but the truth;

That said deposition was taken down in shorthand by me and thereafter transcribed into typewriting under my direction.,

I further certify that I am neither counsel for nor related to any party to said action, nor in anywise interested in the outcome thereof.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal, this 4th day of November, 1982.

DAWSHA LAYLAND
Notary Public in and for the County
of Los Angeles, State of California

APPENDIX L
DEPOSITION OF WINFIELD SCOTT STANLEY, JR.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC., ET AL., *Plaintiffs*	*	
vs.	*	No. 81-2240
JACK ANDERSON, ET AL., *Defendants*	*	

DEPOSITION OF WINFIELD SCOTT STANLEY, Jr., A witness called by and on behalf of the Plaintiffs pursuant to the Federal Rules of Civil Procedure, before Judith McGovern Williams, a Registered Professional Report and Notary Public in and for the Commonwealth of Massachusetts, at the offices of American Opinion, 4 Hill Street, Belmont, Massachusetts 02178 on Friday, August 20, 1982, commencing at 11:00 a.m.

APPEARANCES:

Chaplin, Casner & Edwards (By Robert A. Murphy, Esq.) 30 Federal Street, Boston, Massachusetts 02110, on behalf of the Plaintiffs.

Gary Handy, Esq., 305 Concord Avenue, Belmont, Massachusetts 02178 on behalf of the Deponent.

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(EXHIBIT OMITTED IN PRINTING JOINT APPENDIX)

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MR. HANDY: We're going to conduct this pursuant to the usual stipulations, as to objections as to form?

MR. MURPHY: Yes.

MR. HANDY: We would like to reserve the right to review Mr. Stanley's testimony prior to signing the deposition.

MR. MURPHY: That would be fine.

MR. HANDY: Something as sensitive as this, we just want to be sure it is accurately quoted.

MR. MURPHY: That's fine.

I want to make a statement for the record.

(Telephone interruption.)

MR. MURPHY: This deposition of Mr. Stanley is being taken in the proceeding Liberty Lobby, Inc. and Willis Carto vs. Jack Anderson et als in the United States District Court for the District of Columbia, Civil Action No. 81-2240.

WINFIELD SCOTT STANLEY, JR., having been duly sworn, answered as follows in answer to direct interrogatories by MR. MURPHY:

Q. Would you state your name, please, sir.

A. My name is Winfield Scott Stanley, Jr.

Q. Mr. Stanley, did you receive a subpoena to appear today at this deposition?

A. I did.

Q. Are you appearing here today pursuant to that subpoena?

A. I am.

Q. What is your occupation, Mr. Stanley?

A. I am a magazine editor. I am editor of *The Review of the News*, a national weekly news magazine of 80 to 96 pages, and of *American Opinion*, a journal of political affairs, which runs 112 pages a month.

Q. How long have you been editor of each of those publications?

A. I have been editor of *American Opinion* for over 20 years, and I was the founding editor of *The Review of the News*, the first publication was 1965.

Q. What is your age?

A. I am 44 years old.

Q. Are you a college graduate?

A. I am.

Q. From which college did you graduate and in what year?

A. I graduated in 1960 from Earlham College.

Q. Have you had any other jobs between the time you have graduated from college and your becoming editor of these magazines?

A. I was briefly employed to raise funds and give speeches for Young Americans for Freedom, a group on whose national board I served, but within a year of leaving college I was employed as an editor by American Opinion.

Q. What is the address of *American Opinion* magazine? In other words, what is your business address?

A. 395 Concord Avenue, Belmont, Massachusetts 02178.

Q. Are you married, Mr. Stanley?

A. I am.

Q. Do you have any children?

A. I have three children.

Q. What are their ages?

A. They are age 22, 19 and 17.

Q. What is the family's address?

A. We live at No. 7 Redwood Road in Acton, Massachusetts.

Q. Do you belong to any organizations?

A. Yes. I am a member of the John Birch Society and of the Council for National Policy.

Q. What is the Council for National Policy?

A. That is a prestigious organization of 700 national conservative leaders, including sitting congressmen and senators, editors of conservative publications, heads of conservative political action committees, which meets quarterly.

Q. As a result of your organizational affiliation and your occupation as editor of *American Opinion* magazine, have you had occasion in the past to make public lectures?

A. I have. I have addressed audiences ranging from the Annual Convention of the National Association of Manufacturers

to the Woodrow Wilson School of Political Affairs at Princeton. I have lectured at Harvard. I lectured at the Political Warfare College of the Republic of China. I have appeared on national radio and television on numerous occasions.

Q. Does that activity, that is this lecture and public appearing activity, continue to the present?

A. It does, though in the last several years my editorial responsibilities have become so intense that I now give no more than four or five public addresses a year.

Q. Would it be accurate to say that you are a well-known person in conservative political circles?

A. Yes, I am.

Q. This may be a bit embarrassing for you to answer, but it is also fair to say you are a well-respected person in the same political conservative circles?

A. I think that is fair.

Q. Mr. Stanley, I want to refer you to a magazine called *The Investigator*, more specifically to the October 1981 edition of that magazine, and ask you whether or not you have read an article that begins on Page 21 of that October 1981 issue of *Investigator* magazine entitled "The Private World of Willis Carto"?

A. I have read it.

MR. MURPHY: I would like to have the cover page, the gave containing the masthead, and the pages which contain the article to which I have just referred marked as an exhibit to Mr. Stanley's deposition.

(*The Investigator*, (October 1981 issue marked Exhibit No. 1 for Identification.)

Q. (By Mr. Murphy) Mr. Stanley, if you would look at the masthead of the October 1981 edition of *The Investigator* magazine, you will notice that the publisher is Jack Anderson. Do you see that, sir?

A. I do.

Q. Have you ever met Mr. Anderson?

A. No.

Q. Have you ever spoken with Mr. Anderson?

A. No.

Q. To your knowledge, have you ever communicated with him in any fashion?

A. In no way.

Q. How can you be so certain?

A. Because I am familiar with Mr. Anderson's reputation, have studied his career, and would not as a matter of policy speak with him, accept his calls, or correspond with him in any way.

MR. MURPHY: Off the record.

(Discussion off the record.)

Q. Referring you to Page 21 of the same issues of *The Investigator* magazine, the article to which I have referred "The Private World of Willis Carto" was written by a Carles Bermant, B-e-r-m-a-n-t. Have you ever met Mr. Bermant?

A. I have not.

Q. Have you ever spoken or communicated in any fashion to your knowledge with Mr. Bermant?

A. I have not.

Q. If you would take your time and look at the names appearing on the masthead of the October 1981 issue of *The Investigator* magazine, I would ask you the same series of questions. To your knowledge have you ever met any of these individuals?

A. I have not.

Q. Have you ever spoken with or communicated in any fashion with any of these individuals?

A. I have not.

Q. Were you interviewed for the article called "The Private World of Willis Carto", appearing in this issue of *The Investigator* magazine?

A. I assuredly was not.

Q. Did you receive any written communications or questions to which you responded in connection with the preparation, writing and publication of this article?

A. I did not.

Q. I refer you to Page 23 of the article to which we've been referring. In the left-hand column, about a third of the way down the page, the following paragraph appears, quote:

"Why does Scott Stanley, the managing editor of the John Birch Society's American Opinion, say, 'In my opinion, the preservation of anti-Semitism as a movement has occurred because of the activities of Willis Carto'?"

Close quote.

Do you see that paragraph, Mr. Stanley?

A. I do.

Q. Did you make such a statement?

A. The quotation is manufactured, a fake, a phoney.

Q. It is not your quotation, is that correct?

A. That is correct.

Q. I refer you, sir, to Page 25 of this article, the right-hand column, about a third of the way down the page, and would read you, will read you this sentence which appears in the article, quote:

"And Birch Society editor Scott Stanley notes that 'Whenever you find anti-Semitic literature coming out from some little fly-by-night front, it seems to be associated with the Carto network.' "

Close quote.

Do you see that sentence, Mr. Stanley?

A. I do.

Q. Did you make that statement?

A. The quotation is as spurious as the other, fraudulent, fake, phoney.

Q. That is not your statement, is that correct, sir?

A. That is correct.

Q. Have you, Mr. Stanley, ever published either of those quotations?

A. I have not.

Q. Have you ever made these statements for publication?

A. I have not.

Q. How can you be certain of that, sir?

A. Because it is a matter of corporate and personal policy not to comment for publication on the activities of Willis Carto or Liberty Lobby.

Q. So is it fair to say that these two quotations which are attributed to you have never been written, either in this or similar form, by you?

A. That is correct.

Q. Again is it fair to say, it is accurate that these statements or similar statements conveying the same meaning have never been made by your orally at any public way or for publication in any manner?

A. That is correct.

Q. Mr. Stanley, have you been given any money by Liberty Lobby or Mr. Carto for this deposition?

A. There was a $23 witness fee that arrived with the subpoena.

Q. Have you received any other money for purposes of giving this deposition?

A. Certainly not.

Q. Have you been given any other thing of value for your testimony here today?

A. No thing of value. No money, no payment of any kind. I was subpoenaed.

Q. No promises of any sort have been made to you by the Liberty Lobby or Mr. Carto or attorneys for either in connection with this deposition, is that correct?

A. No I have had no communication with Liberty Lobby or Mr. Carto, nor have I discussed the matter with them, except to the extent of having received inquiries from their attorney, Mr. Fleming Lee, as to whether I had seen the article. I had not. They sent me a copy of the article and asked me if I had indeed made these statements for publication by Jack Anderson and *The Investigator* magazine.

Q. To which you have already said you did not, and you have not? Is that correct?

A. I did not. I have not. I would not.

MR. MURPHY: I have no further questions.

MR. HANDY: There will be no questions.

(Whereupon, at 11:25 a.m., the deposition adjourned).

CERTIFICATE

I, WINFIELD SCOTT STANLEY, JR., do hereby certify that I have read the foregoing transcript and it is true and accurate to the best of my knowledge and belief.

_____

Winfield Scott Stanley, Jr.

Sworn to and subscribed before me this 23rd day of August, 1982.

_____

Notary Public

My commission expires January 3, 1986

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.

I, Judith McGovern Williams, a Notary Public duly commissioned and qualified within and for the Commonwealth of Massachusetts, do hereby certify that there came before me on the 20th day of August 1982 at 11:00 a.m. the person hereinbefore named, who was sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to typewriting by me; and that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof, I have hereunto set my hand this 20th day of August, 1981.

_____

My commission expires
March 18, 1988.

Registered Professional Reporter
and Notary Public.

APPENDIX M
DEPOSITION OF VINCENT A. DROSDIK, III

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC. AND WILLIS A. CARTO, et al.,	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	No. 81-2240
	)	Judge Parker
JACK ANDERSON, et al.,	)	
Defendants.	)	

Washington, D.C.
Friday, August 27, 1982

Deposition of

VINCENT A. DROSDIK, III,

a witness in the above-entitled cause, was called for examination by counsel for the Plaintiffs, pursuant to notice as to the taking of the deposition of Vincent A. Drosdik, III at the offices of Harter, Calhoun & Williams, 423 Washington Building, 15th Street and New York Avenue, N.W., Washington, D.C. 20005, before J. F. Coughlin, a notary public in and for the District of Columbia, beginning at 4:25 p.m., when were present on behalf of the respective parties:

FOR THE PLAINTIFFS:

FLEMING LEE, ESQ.
300 Independence Avenue, S.E.
Washington, D.C. 20003

FOR THE DEFENDANTS:

(NOT PRESENT)

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WITNESS:	EXAMINATION BY: MR. LEE
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(EXHIBIT OMITTED IN PRINTING OF JOINT APPENDIX)

EXHIBITS

	MARKED FOR IDENTIFICATION
Exhibit No. 1 (Reproduced magazine articles)	7

Thereupon,

VINCENT A. DROSDIK, III,

a witness, was called for examination by counsel for the Plaintiffs, Liberty Lobby, Inc., and Willis A. Carto, et al. and, after having been duly sworn by the notary public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFFS LIBERTY LOBBY, INC., AND WILLIS A. CARTO, et al.

BY MR. LEE:

Q. Would you please state your name for the record, sir?

A. Vincent A. Drosdik, III.

Q. I am the attorney for the plaintiffs in a lawsuit which is being brought by Liberty Lobby and Willis A. Carto against Jack Anderson. You are already aware that such a lawsuit is taking place, but since we have not had a chance to discuss it after you arrived here, I wanted to be sure that it was on the record that you understood.

A. Yes, I do.

Q. Where were your born, please?

A. I was born in Cambridge, Massachusetts.

Q. What is your age?

A. 31.

Q. Where do you live?

A. I live in Arlington, Virginia.

Q. During the year 1981 did you have a telephone?

A. 1981? Yes, I did.

Q. Was the number listed in the directory?

A. Yes, it was.

Q. Do you know in which directory it was listed?

A. It was listed in Arlington, Virginia.

Q. Under your name?

A. Yes.

Q. Was it there throughout that year?

A. Yes, throughout that entire year, 1981.

Q. Are you employed at this time?

A. Yes, I am.

Q. What is your employment?

A. I am managing editor of the consumer newsletters for Phillips -- that is double "l" -- Publishing Company.

Q. How long have you been employed there?

A. Since May 15th, 1981.

Q. What is the office address, please?

A. Suite 1200 North, 7315 Wisconsin Avenue, Bethesda, Maryland 20814.

Q. Would you please give us a brief summation of your educational background?

A. I passed high school and two and a half years at the University of Virginia. That is the formal education.

Q. Did you study any particular subject?

A. Liberal arts, no major. I did study journalism at the Defense Information School in Indiana for a standard three month course before going overseas when I was in the Army.

Q. Just to fill in your personal history, during which period were you in the Army?

A. July 1971 through July 1974.

Q. What were your duties during that period?

A. I was a journalist. I was editor of the Berlin Observer in West Berlin from January of 1972 until about a week before my discharge in July 1974.

Q. Did you have any employment prior to going into the military?

A. Nothing worth putting on a resume, shall we say. Odd jobs.

Q. So, you went into the military journalism fairly soon after you left college?

A. I put a year into the University of Virginia and then went into the Army.

Q. How about the period since you came out of the Army? Would you give us a summary?

A. A year and a half at the University of Virginia.

Q. I am thinking of your employment.

A. Employment. I worked as press secretary for Callahan for the Congressman's campaign in Virginia's 10th District in 1976; proofreader for Technassociates, downtown Washington, for the first half of 1977; *The Spotlight* from late June 1977 through late June 1978; wire editor of the Virgin Islands Daily News, St. Thomas from late October 1978 through the end of April 1980; miscellaneous jobs as a free lance writer/editor and so forth, the rest of 1980 and early 1981 and then with Phillips Publishing since May of 1981.

Q. Thank you. I am now going to hand you a document which has already been marked by the reporter as Exhibit No. 1 for this deposition. I see you already have your own copy, but what it is is a copy of a portion of the *The Investigator* magazine issued in October 1981. The exhibit which has been marked shows the cover of that issue and shows the masthead page and then reproduces two articles, which were published under the heading "America's Neo-Nazi Underground." Let me ask you first, have you read the articles that are reproduced here?

(Whereupon, the above-mentioned document was marked as Exhibit No. 1 for identification and was retained by counsel.)

A. I read them when they were issued in *The Investigator* last year.

Q. If I could please ask you to turn to page 41?

A. I have.

Q. The paragraph in the third column, about a third of the way down the page, begins, "Vincent A. Drosdik, III . . ." I suppose it would almost be redundant to ask you if you were the person referred to there.

A. I was, indeed.

Q. Were you aware prior to the publication and public distribution of this article that you were going to be mentioned in it?

A. I was not.

Q. I am going to read aloud the two paragraphs which we are discussing. "Vincent A. Drosdik III, a one-time assistant editor of *The Spotlight* who says he quit after nine months because he 'couldn't take the inside-the-office racism,' tells of another instance where a feature was contrived to serve Carto's political prejudice. This time the target was Yugoslavia's Marshal Tito.

" 'Tito was scheduled to come to town,' Drosdik recalls. 'Carto had this wild hair up his ass about getting Croatian exiles to protest the visit. We couldn't find any. So, we went to our typesetter and renamed her 'Ginny Dragonovich.' We quickly made up a poster for her and took her to the Capitol building. Well, the 'protest' lasted all of two minutes -- just enough time to photograph her.' "

Did you ever make a statement of the general nature of that which we have just read?

A. Of a general nature, yes.

Q. Is the statement as it appears here on page 41 of the exhibit a verbatim report of statements which you made?

A. To the best of my recollection, it is technically correct, but it is not the complete statement that I made to the reporter.

Q. Do you recall in which respect this is taken out of context?

A. Yes. It was, I believe, October 1980, when I received a phone call from an individual whom I cannot recall his name, but he was calling from New York long distance. He said he was writing an article on Liberty Lobby and I asked where it was going to be printed. He indicated it would probably be printed in *Esquire Magazine*. It had been over two years since I had left

Spotlight, so I asked him right up front to please make sure that he would get back to me before printing the article just to make sure that what he wrote was correct and in context. Two years can make unclear anyone's memory.

He asked about if there were any instances that I recalled that demonstrated any sort of distortion of the news by *The Spotlight*. The only serious example I could think of was the one that you quoted to me that is mentioned in this article. This is, frankly, the worst and if it was the worst, it was, frankly, rather tepid.

The writer of the article says that the incident was contrived to serve Carto's political prejudices. That is a rather curious phrase, because I did not use that phrase myself. The writer imputed that to my own statement. In fact, *The Spotlight* then, and I presume it is still, was very anti-Communist, just as I was and still am myself. And if that is a prejudice, well, so be it. I would call it more a principle, than a prejudice.

I made it clear that we knew at *The Spotlight* that there was major opposition to Marshal Tito in the Yugoslavian communities in the United States, primarily in Chicago, but elsewhere in the country. We had received phone calls, letters and so forth at *The Spotlight* from these anti-Communist exiles and their immediate descendants. So, we knew there was, indeed, heavy opposition to Tito's visit.

Unfortunately, Mr. Carto, the publisher, wanted to have a photograph of one of these exiles put on the front page of *The Spotlight*. Well, the story had just been written that very afternoon. It was a Wednesday afternoon, a deadline day. He couldn't find anyone really quickly. So, Mr. Carto ordered that our typesetter pose as an exile with a poster protesting Tito's visit. I didn't think this was terribly ethical, but on the other hand, it wasn't totally a lie because opposition did, indeed, exist and there were the demonstrations against Tito's visit, which, by the way, never materialized, elsewhere in the country.

So, the two paragraphs in this article are deceptive by taking the story out of context.

Q. If you have already said this, I apologize, but did you

state approximately when you received the telephone call from New York?

A. It was probably October or early November of 1981. Excuse me. Of 1980, because in late November 1980, I moved from the house where I was living to my present apartment and I am certain of the time of that phone call and I never did receive a second phone call, as I was promised, to clarify what I said over the phone and to make sure that the writer got his story correct.

This is standard procedure, frankly, for a feature article. In my journalism training, if someone consents to an interview, you follow that person's request in terms of double checking quotations. Where a daily newspaper that might be excused because there is always the next day, as it were, to correct or clarify any mistakes or omissions, but for a magazine article, it is inexcusable not to get back to the person. And I was always in the phone book and not difficult to find at all in the Washington area.

Q. It would be true to say then, would it not, that you never met, saw or again communicated with the person who interviewed you over the telephone?

A. This is correct.

Q. Were you ever contacted at any time by any person who purported to be a representative of Jack Anderson or *The Investigator* magazine?

A. Never.

Q. Just to be sure that we cover this thoroughly, I would like to show you, I believe, what is called the masthead page of the exhibit, which is *The Investigator* magazine of October '81 and please read the names to yourself and tell me if you can spot any name there, which would be that of a person who had contacted you about the article or about your statement in it?

A. I am sorry. I cannot recognize any of these names. It was Charles Bermant's byline. I recognized after the article, and he is listed as associate editor. But I cannot honestly remember that person speaking with me. I did not, unfortunately, note the name of the reporter and, in fact, promptly forgot about the

whole incident, since I never got another phone call.

Q. Was that one telephone call the only communication you ever had with anybody about this statement prior to the publication of the article?

A. There may have been a second call only a few days later, but if there was a second phone call, it was simply for more questions and then those phone calls were only about a week apart, if, indeed, there was a second phone call. My memory simply is not totally clear on this, but there was never an attempt to get back to me to verify what I said to indicate that I was speaking to someone for an article for Jack Anderson's magazine.

Q. If there was a second phone call, who made it?

A. It was the same person, whoever it was, and it was from New York. I do recall that.

Q. As a professional journalist of considerable experience, how would you rate your knowledge of the standards of investigation and reporting ordinarily adhered to by responsible publishers?

A. Well, as I said, for a feature article of this depth and this severity, frankly, one would double and triple check all sources --

Q. I hate to interrupt you, but I believe you misunderstood my question. I was going to ask you the one which I think you are about to answer. I asked you if you would rate yourself, how would you rate yourself, in view of your experience, as to your knowledge of the standards, of those standards?

A. Very good. I had professional training in the Defense Information School and practical experience at the Daily News in St. Thomas and other newspapers and newsletters and so forth. I would say I have sufficient experience to make a judgment.

Q. Well, you read my mind because I was going to ask you how you rate according to those same standards the actions of the person who interviewed you and the actions or non-actions of the persons who published your alleged statement in *The Investigator*?

A. Unethical on the part of the reporter, who never did get back to me, despite promising that he would and on the part of

the final writer, editors, publisher, the rest of the article is -- well, I have no personal knowledge of many of the incidents mentioned in the rest of their article.

Q. Don't try to make any suppositions about things of which you have no personal knowledge.

A. Fine. As far as just where I was mentioned, it was incomplete and unethical and there was no excuse for it, since I was still in the Washington area and was a phone call away.

Q. Let me just conclude by asking you for the record, were you paid anything to give this deposition?

A. No, I was paid nothing.

Q. Was any promise or any other sort of consideration given to you?

A. No, nothing whatsoever.

MR. LEE: Thank you very much for your time and off the record.

(Discussion off the record.)

(Whereupon, at 4:45 p.m., the deposition was adjourned.)

CERTIFICATE OF NOTARY PUBLIC

I, J. F. Coughlin, the officer before whom the foregoing deposition was taken, Pages 3 through 15, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by the witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or an employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

_____

J. F. COUGHLIN

Notary Public in and for
the District of Columbia

My commission expires:
March 14, 1986.

CERTIFICATE OF DEPONENT

I hereby certify that I have read the foregoing pages 3 through 15 of my deposition testimony taken in this proceeding and with the exception of changes and/or corrections, if any, find them to be a true and correct transcription thereof.

_____

September 6, 1982

Date

CERTIFICATE OF NOTARY PUBLIC

Subscribed and sworn to before me this the _____ day of _____ . 1982.

_____

Notary Public in and for

_____

My commission expires:

_____

APPENDIX N
DEPOSITION OF SARAH S. JOBE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC.	X	
AND		
WILLIS A. CARTO	X	CIVIL ACTION
vs.		No. 81-2240
JACK ANDERSON, ET AL.	X	

ORAL DEPOSITION OF SARAH S. JOBE

APPEARANCES:

Counsel for Plaintiffs
Danny C. Wash, Esq.
WASH & SEGREST
6609 Sanger
Waco TX 76710
For
Fleming Lee, Esq.
300 Independence Avenue, S.E.
Washington, D.C. 20003

Counsel for Defendants
David J. Branson, Esq. (No appearance)
WHITE AND CASE
1747 Pennsylvania Avenue
Washington, D.C. 20006

Leonard Appel, Esq. (No appearance)
Suite 1032 Pennsylvania Building
Pennsylvania and 13th Street
Washington, D.C. 20004

Oral Deposition of Sarah S. Jobe, taken before Don Booth, Official Court Reporter of the 146th Judicial District of the County of Bell and State of Texas, at the residence of said wit-

ness, 905 North Main Street, Belton, Texas, on the 22nd day of January, 1982, beginning at 2:10 p.m., and pursuant to the notice hereto attached.

NOTICE

UNITED STATES DISTRICT CO.
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC. and WILLIS A. CARTO, *Plaintiffs* v. JACK ANDERSON, et al., *Defendants*	)	CIVIL ACTION No. 81-2240

NOTICE OF ORAL DEPOSITION

PLEASE TAKE NOTICE that Liberty Lobby, Inc., plaintiff in the above-captioned action, will take the oral deposition of Sarah S. Jobe, pursuant to Rule 30 of the Federal Rules of Civil Procedure, commencing at 2:00 P.M. on January 22, 1982, at 905 N. Main Street, Belton, Texas 76513, before a duly authorized court reporter or a Notary Public.

Fleming Lee
300 Independence Ave., S.F.
Washington, D.C. 20003
(202) 546-5611
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

SARAH S. JOBE,

DULY SWORN, TESTIFIED AS FOLLOWS, TO-WIT:

EXAMINATION,

BY MR. WASH:

Q. Okay. Let's get started. Mrs. Jobe, my name is Danny C. Wash and I'm the attorney here that is going to take your deposition today on behalf of Liberty Lobby, Incorporated, and Willis A. Carto, who are plaintiffs in a suit against Jack Anderson and others in a civil action, Number 81-2240 in the U.S. District Court of the District of Columbia.

Would you state your full name, please.

A. My name is Sarah Shields Jobe.

Q. And where do you live.

A. I live at 905 North Main, Belton, Texas.

Q. How long have you lived here?

A. I've lived here about five years.

Q. Now, I would like the record to reflect that we've started the deposition at approximately 2:10 p.m. central standard time. And there is no appearance for any of the defendants' attorneys and there is nobody here. No other attorney; there's only you and me and Mr. Don Booth, the court reporter; is that correct?

A. That's correct.

Q. And is there a house number out in front of this apartment?

A. Yes.

Q. Is it a duplex?

A. It's a duplex, yes.

Q. And there's a house number out there, 905--

A. 905.

Q. This is Main Street?

A. Main Street. North Main.

Q. North Main Street. Would you state where you were born?

A. I was born in Nashville, Tennessee.

Q. In what year?

A. February the 25th, 1892.

Q. And have you ever been married?

A. Yes. I was married to Thomas Calhoun Jobe.

Q. Okay. What year was that?

A. In 1918.

Q. Where did you live?

A. Hope, Arkansas.

Q. Did you ever move to Washington, D.C.?

A. I moved to Washington in September, 1942. I came up to work for the Government. It was the war and I stayed up here until--Well, I was up here nearly all the time since then, until I was hurt.

Q. You said "up here." You meant up in Washington?

A. I mean Washington.

Q. Washington, D.C.

A. I was in Washington, D.C. practically all the time.

Q. From say 1942 --

A. 1942.

Q. -- through --

A. Through 1976 when I was hurt in Washington.

Q. Okay. What did you do when you first came to Washington?

A. They brought me here to be with my daughter. I wasn't able to do anything and they brought me here --

Q. Excuse me. You didn't understand. I meant what did you do when you first went to Washington in 1942?

A. I was in the General Accounting Office as a contract examiner in the General Accounting Office.

Q. What did you do after that job?

A. I did largely on my own. I did research for different people. I wrote. And my husband had been a politician and I connected with the -- I was up on the Hill dealing with the congressmen and senators and I was working, I was writing, and I was doing just anything -- no real job.

Q. Now, would you state whether or not you ever were employed by Liberty Lobby?

A. I was employed by Liberty Lobby to do two jobs, file the articles in the cabinet, set up their files on a job basis, and then the library, I set up their library for them. And I worked absolutely under the direction of W. B. Hicks, secretary --

Q. Would you state who hired you to work for Liberty Lobby?

A. Mr. Hicks.

Q. And he was in what position?

A. He was executive secretary, absolutely in charge of everything as far as I know. He hired and fired.

Q. Would you state whether or not Willis Carto hired you?

A. No. He didn't hire me. I didn't -- I never knew Carto and I never had any business at all with Carto.

Q. Did you know Mr. Carto?

A. No, I did not know him.

Q. Did he ever give -- Did Mr. Carto, Mr. Willis Carto ever give you any instructions?

A. He never gave me any instructions in any way.

Q. Now, your job for Liberty Lobby, you said a moment ago, involved setting up some files. What kind of files were you setting up?

A. Well, they were the articles that people from all over the country sent to Liberty Lobby for their letters and for the work that they were doing, and they were in boxes and I put them in a file cabinet and set them up according to the system that they use in the Library of Congress. See, I worked in the Library of Congress so much and I know their system, and that's the reason Mr. Hicks employed me.

Q. Well, so you just organized the files and organized them according to subject, or article or what?

A. Well, I set them up according to the system so that you could find them. I had charts and I filed them according to subject and so that people could find them.

Q. And who was your direct supervisor when you were working there?

A. Hicks.

Q. Mr. Hicks. Then Mr. Hicks told you to set the files up?

A. Absolutely. He's the only man I had anything to do with because I knew the job and I had nothing to do with the office work. I knew the people, just coming and going.

Q. Were you paid by the hour, or by the month, or what?

A. I was paid by the hour.

Q. After you finished setting up these files containing articles people sent in from all over the country, what did you do then for Liberty Lobby?

A. Hicks bought a set of books and he asked me to set up his library and I set up his library, and it was in an adjoining room to the files. The library was here and --

Q. Mrs. Jobe, we've got a copy of an article in The Investigator Magazine of October 1981 ICD 08480, and--

(The fourteen page magazine above referred to was here marked for identification by the reporter as Plaintiffs' Exhibit No. 1, Depo. of Sarah Jobe, 1-22-82.)

(EXHIBIT OMITTED IN PRINTING JOINT APPENDIX)

Q. --it's labeled P-1 Depo. of Sarah Jobe, 1-22-82, and there is a paragraph in that article that does not show a page (39), but at the mid-part of the page it says "Carto (Continued from page 27)" and contained therein is this statement I'm going to read to you: "Carto once instructed Sarah Shields Jobe to assemble a 'KKK' (Kosher Konservative Congressmen) file that listed secret organizations to which certain Congressmen belonged. Disturbed by what she saw as the potential for blackmail, she defected, turning over several Carto files to columnist Jack Anderson's reporters."

Now, first let me ask you whether or not you were ever instructed by Carto, a Willis Carto, to assemble a KKK or a Kosher Konservative Congressmen file that listed secret organizations to which certain Congressmen belonged?

A. I was never instructed by Carto to set up this file on the Congressmen.

Q. Okay. So, therefore, you were not disturbed by what you saw as a potential for blackmail?

A. Why, I didn't know anything about it. There was nothing I saw.

Q. Now, it says here that you were disturbed by what you saw as a potential for blackmail; were you or were you not disturbed?

A. Oh, no.

Q. Okay. And it says you defected. Did you ever defect?

A. Well, I left there because --

Q. Let me ask you this, would you tell the court and the jury why you left Liberty Lobby's employ?

A. Yes, because when I would go out to lunch Jerry Dunn would lock me out of the office. There was only one door and he locked me out. Sometime I would sit there an hour, and I just walked out.

Q. It was --

A. I was practically through with all the work, even the library.

Q. What you're saying then is the reason you left was a disagreement with Mr. --

A. Dunn.

Q. -- Dunn over him locking you out?

A. Absolutely. That was the only reason.

Q. Why was he locking you out?

A. Don't ask me.

Q. Would he come and then let you in?

A. No. Somebody else would come that would have a key and they would -- I don't know, it's been so long ago. But I'm not used to being done that way and I wouldn't take it, and I'm nearly through with the job anyway. And then I had another job. I had an investigation, some parties wanted me to do some research.

Q. Let me ask you this, then: When you left the employ of Liberty Lobby, would you state whether or not you turned over several Carto files to Jack Anderson's reporters?

A. I did not. I've had no dealings with Jack Anderson.

Q. What about any of his reporters?

A. None of his reporters.

Q. Did you take any files with you when you left?

A. I never had any files. I never took any files out of Liberty Lobby.

Q. About when was it that you worked for Liberty Lobby?

A. Oh, it was between ten and fifteen years ago, because I have--

Q. When you worked there were you ever required -- will you state whether or not your were ever required to take a lie detector test?

A. Oh, no. I never was required to do anything because it wasn't necessary. I was just filing.

Q. Would you state whether or not you ever talked with Willis Carto?

A. Not that I know of.

Q. Did you know who Willis Carto was and what he looked like?

A. Why, no I didn't know what he looked like, but I knew who he was. Everybody knew Willis Carto -- at least in the office, they spoke of him, but I didn't know him because he was always in California.

Q. Well, let me ask you this then, concerning the statement in the article marked P-1; it said that "Carto once instructed Sarah Shields Jobe to assemble a KKK file." Did anybody else in Liberty Lobby ever instruct you to assemble a KKK (Kosher Konservative Congressmen) file?

A. Absolutely not. And I never did any assembling of a file for anybody in the library in Liberty Lobby. Mine was only jobwork.

Q. So what you're saying is you never compiled any kind of file on any Congressmen about a secret organization they --

A. Absolutely not.

Q. Did you work for Liberty Lobby after you left?

A. Oh, no.

Q. Are you working for Liberty Lobby now?

A. Oh, no. I'm doing on my own.

Q. I think that you stated earlier that you had had a call, a telephone call from someone who represented himself to be an attorney in Washington, D.C.?

A. Yes.

Q. Would you tell me about that?

A. Well, he called and said "I'm a lawyer, a Washington lawyer," and gave his name. I don't recall it. And he said, "Mr. Lee has just told Jack Anderson that you are to testify." Says, "Are you going to testify?" I said, "Yes."

Q. Let me ask you this, then: How long ago was that?

A. It was about three or four days ago, maybe a week ago. It was when I wrote you.

Q. Okay. Now, let me ask you whether or not I represent you; am I your attorney?

A. No, you don't represent me.

Q. Okay. I just wanted to establish that.

A. No.

Q. And you are not a plaintiff in this lawsuit?

A. Absolutely not. Oh, yes, and he asked me if Liberty Lobby was paying me, or whether I was doing it on my own, and I said, "I'm doing it on my own." And he says, "Why?" And I said, "Because it's a lie."

Q. And when you talk about "it's a lie," were you talking about the quote in this article that I read to you a moment ago?

A. Yes, the article that I would testify against.

Q. While you were working there for Liberty Lobby, was there anybody, any other woman there named Sarah Shields Jobe?

A. Absolutely not.

Q. You were the only one working there --

A. I'm the only Sarah Shields Jobe that I know of.

Q. So then to sum up the statement that I read you in P-1 from the article in The Investigator in October of '81, that statement concerning the congressmens' -- KKK file was an absolute lie; is that what you're saying?

A. Yes.

Q. All right.

A. I don't think they had any files. I don't think they had any information on them. I didn't have anything to do with it.

Mr. Wash: Okay. That's all the questions I have.

Sarah Shields Jobe

State of Texas X

County of Bell X

Sworn to and subscribed before me, the undersigned authority, on this 26th day of January, 1982.

Don Booth, CSR #318
146th Judicial District
Bell County, Texas

My commission expires April 15, 1984.

State of Texas X

County of Bell X

I, Don Booth, Official Court Reporter of the 146th Judicial District of Bell County, Texas, do hereby certify that the facts stated by me in the caption hereto are true; that the above and foregoing answers of the witness, to the questions as propounded, were made before me by the said witness after first being duly sworn to testify the truth, the whole truth and nothing but the truth; the same were reduced to typewriting under my supervision, and the above and foregoing deposition as set forth in typewriting is a full, true and correct transcript of the proceedings had at the time of taking the said deposition.

I further certify that I am not, in any capacity, a regular employee of the party in whose behalf this deposition is taken, nor am I in the regular employ of his attorney, and I certify that I am not interested in the cause, nor am I of kin or counsel to the parties.

Given under my official hand and seal of office on this 26th day of January, 1982.

Cost: Paid by
PLFS.—$125.00

Don Booth, CSR #318
Official Court Reporter
146th Judicial District
Bell County, Texas

My commission expires April 15, 1984.

APPENDIX O
PETITIONERS' STATEMENT OF MATERIAL FACTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC. AND WILLIS A. CARTO,		
Plaintiffs,	:	Civil Action No.
v.	:	81-2240
JACK ANDERSON, THE INVESTIGATOR PUBLISHING COMPANY, AND BILL E. ADKINS,	:	Judge Parker
Defendants.	:	

STATEMENT OF MATERIAL FACTS

Pursuant to Local Rule 1-9(h) of the United States District Court for the District of Columbia, defendants submit this Statement of Material Facts in support of their Motion for Summary Judgment.

PLAINTIFFS IN THIS ACTION

1. Plaintiff Liberty Lobby, Inc. ("Liberty Lobby") is a not-for-profit corporation headquartered in the District of Columbia. (Complaint, ¶3).

2. Since 1955 Liberty Lobby has "advocated and promoted patriotism, nationalism, lawfulness [and] protection of the national interest. . . ." (Complaint, ¶12.)

3. Plaintiff Willis A. Carto ("Carto") is the founder and treasurer of Liberty Lobby. (Complaint, ¶2.)

4. Carto wrote the 35 page introduction to the second printing of Francis Parker Yockey's *Imperium*. Carto described *Imperium* as "prophetic; the work of an intuitive seer." (Appendix to Affidavit of Charles Bermant, at 5 (hereinafter cited as "Appendix").)

5. Carto has written a number of articles and has published some of them under pseudonyms. He has used the names E. L. Anderson and Frank Tompkins in writing articles for *Right*, *Liberty Letter*, *The Spotlight*, *Washington Observer*, and *American Mercury*. (Plaintiffs' Answers to First Set of Interrogatories by Defendants, Int. Answer 9.)

6. Plaintiffs Liberty Lobby and Carto speak through their own vast media network. *The Spotlight* is Liberty Lobby's "weekly national newspaper." (Complaint, ¶12.) *The Spotlight* boasted 345,000 subscribers in January 1981. (Appendix, at 12 (citing *The Spotlight*, January 5, 1981).) Plaintiffs' daily radio commentary, "This is Liberty Lobby," is now broadcast on 460 stations. Plaintiffs' newest venture, a weekly half-hour television news show, is now broadcast on 30 stations. *(Id.)*

7. Liberty Lobby also sells, publishes or distributes approximately 49 publications, including such materials as "Debunking the Genocide Myth," "The Hoax of the Twentieth Century," "The Battle for South Africa," "Imperium," and "The White Paper on the ADL." (Plaintiffs' Answers to First Set of Interrogatories by Defendants, Int. Answer 10.)

DEFENDANTS IN THIS ACTION

8. Defendant Investigator Publishing Company was a business corporation incorporated in El Paso, Texas in 1980. (Supplemental Answers to First Set of Plaintiffs Interrogatories to the Investigator Publishing Company, Int. Answers 1 and 7.) The Investigator Publishing Company published *The Investigator* magazine. (Complaint, ¶4; Answer and Counterclaim, ¶4.)

9. Defendant Jack Anderson was the publisher of *The Investigator* magazine. (Complaint, ¶5; Answer and Counterclaim, ¶5.)

10. Defendant Bill E. Adkins was the President and Chief Executive Officer of the Investigator Publishing Company. (Complaint, ¶6; Answer and Counterclaim, ¶6.)

THE CARTO/YOCKEY ARTICLES

11. The articles at issue in this case, "The Private World of

Willis Carto" and "Yockey: Profile of an American Hitler," were published in the October 1981 issue of *The Investigator* magazine. (Complaint, ¶13; Answer and Counterclaim, ¶13.)

12. The articles were written by Mr. Charles Bermant. Mr. Bermant began to work on the articles in early May 1981 and worked on them for over a month. (Bermant Aff., ¶11.)

13. Mr. Bermant's first step in researching the articles was to file FOIA requests concerning Yockey with several government agencies. (Bermant Aff., ¶9.) Next, Mr. Bermant gathered published material about Liberty Lobby, Carto and Yockey. To do this, he visited the Library of Congress, the D.C. Public Library, the Washington Post's library, the files of his office and other places in Washington. He also obtained materials from the San Francisco Chronicle. (*Id.*)

14. As a result of his FOIA request, Mr. Bermant received approximately 1,200 pages of documents. Mr. Bermant carefully studied these materials as well as the other documentary materials he had obtained. (Bermant Aff., ¶10.)

15. Mr. Bermant then began to interview various people, including Helmuth Krave, Joseph Karesh, William P. Clancey, Charles Rauderbaugh and Denne Pettitclerc. (*Id.*) He also contacted Wes McCune, Liberty Bell (a West Virginia based magazine), Thomas Francis, Congressman Hansen, the Federal Election Commission and Anti-Defamation League personnel. (*Id.*) Mr. Bermant also obtained materials from Robert Eringer. (Bermant Aff., ¶12.)

16. Mr. Bermant interviewed Robert M. Bartell of Liberty Lobby and also requested an interview with Carto. Even though Mr. Bermant made repeated efforts to set up such an interview, he was unsuccessful. (Bermant Aff., ¶13.)

17. Mr. Bermant also met with William Cox, the California attorney who represented Mel Mermelstein in his case against the Institute for Historical Review. (In that case, the judge took judicial notice of the fact that the Holocaust had occurred; the Institute had challenged the existence of the Holocaust.) (Bermant Aff., ¶¶15 and 16.) Mr. Cox told Mr. Bermant about his background, which included several years in police work and policymaking at the Justice Department. In addition, Mr. Cox

provided numerous court documents and information about his case against the Institute for Historical Review. (Berman Aff., ¶16.)

18. Mr. Bermant then spent several days writing first drafts of the articles. These drafts were submitted to Jack Anderson for review and John Obert for rewrite. (Bermant Aff., ¶17.) Mr. Obert and Mr. Anderson, who have both covered Carto for a number of years, made several editorial changes on the articles. (Bermant Aff., ¶18.)

19. Mr. Bermant had another meeting with Mr. Cox. At that meeting, Mr. Cox brought Mr. Bermant up to date on the status of his case against the Institute for Historical Review and stated that his research on Carto and his practices was extensive. (Berman Aff., ¶19.) Mr. Bermant then showed Mr. Cox parts of the manuscript for fact-checking purposes and Mr. Cox stated that the story was factually sound. *(Id.)*

20. The sources Mr. Bermant relied upon were reliable. In addition, every one of the challeneged statements in the articles was derived from a reliable source. (Bermant Aff., ¶21; Appendix 1-43.)

21. Congressmen, the Anti-Defamation League, William Buckley's *National Review*, *The Washington Post*, *The Washington Star*, *True*, *The Los Angeles Times* and others have consistently reported that plaintiffs are anti-Semitic, fascist and racist. *(Id.)*

22. Mr. Bermant believed at the time and still believes that the articles he wrote about Carto and Yockey, which were pub-

lished in *The Investigator* were truthful and accurate reports. (Bermant Aff., ¶20.)

August 24, 1982

Respectfully submitted,
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APPENDIX P
RESPONDENTS' STATEMENT OF GENUINE ISSUES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, INC. AND WILLIS A. CARTO,	:	Civil Action
Plaintiffs,	:	No. 81-2240
v.	:	
JACK ANDERSON, THE INVESTIGATOR PUBLISHING COMPANY AND BILL E. ADKINS,	:	Judge Parker
Defendants.	:	

STATEMENT OF GENUINE ISSUES

In accordance with Local Rule 1-9(h) and Rule 56 of the Federal Rules of Civil Procedure, the plaintiffs submit this Statement of Genuine Issues of fact which are in dispute and which necessitate litigation. This Statement accompanies and is referred to in the plaintiffs' Opposition to Motion for Summary Judgment.

Each person deposed in this action has been deposed on only one occasion to date, so depositions will be identified without reference to date. Parties will be referred to by surname only. The words, "article," refer to the article in the October 1981 issue of *The Investigator* magazine which is the subject of this lawsuit.

Issues

1. Whether Anderson or William McGaw was acting as editor during the preparation and publication of the article.

> Q. What sort of work, specifically, did you do in your function as editor or in your editorial capacity in relation to the Investigator Magazine?
> A. I wasn't the editor during this period.
> Anderson Depo., p. 30

Anderson's statement is denied by William McGaw in McGaw's Affidavit, which is attached to the Opposition to Motion for Summary Judgment.

2. Whether Adkins, listed in *The Investigator* as President of the Investigator Publishing Company (attachment to Complaint), carried out editorial functions during the preparation of the article. (Affidavit of Bill E. Adkins; Affidavit of William McGaw.

3. Whether Anderson was motivated to publish an article denigrating the plaintiffs in order to further his business interests as publisher of *The Investigator*. Affidavit of William McGaw, paragraph 13. Deposition of Jack Anderson, pp. 97-98:

> Q. Do you recall ever explaining to anybody, Mr. McGaw or anybody else, why you felt these articles . . . should be published in the Investigator Magazine?
> A. . . . the answer to your question is I don't recall.
> Q. Do you recall every suggesting to anyone that there might be some favorable reception for these articles on behalf of any particular professional group or any other group if you were to publish them in the Investigator Magazine?
> A. No.

(This point involves three issues: Whether Anderson was so motivated, whether Anderson made the statement, and Anderson's credibility.)

4. Whether the defendants deliberately manufactured the illustration which they published on page 27 of *The Investigator* of October 1981, showing a moustached Willis Carto who is made to look like Adolf Hitler giving a Nazi salute. (Falsity averred in Complaint and denied in Answer.)

The only picture of Carto supplied to the art director of *The Investigator*, Bernie Springsteel, was one newspaper picture which was copied as a 3 X 7 inch reproduction. Bermant Depo., p. 13.

Springsteel reported to Anderson and McGaw, and Anderson, McGaw and Adkins would have determined whether or not Springsteel's ideas for illustrations were acceptable for publication. Bermant Depo., p. 15.

The editor of *The Investigator*, William McGaw, told Bernie Springsteel prior to publication that he thought the illustration was possibly libelous, that it looked like Hitler, and that "You'd better get that off there." McGaw Affidavit, para. 17.

Willis Carto testifies that he has never worn a moustache and that to his knowledge no other picture of him ever published has depicted him with a moustache or giving anything remotely resembling a Nazi salute. Carto Aff., paragraph 2.

3. Whether the article contains false statements concerning the plaintiffs. Falsity of the statements is averred in the Complaint and denied in the Answer. Charles Bermant testified that he believes everything in the article is true: Bermant Affidavit. Willis Carto testifies that one of the major allegations of the article is false -- i.e. that Carto was or is a Nazi. Carto Affidavit, paragraph 10.

Three people quoted in the article, or whose actions in relation to the plaintiffs were described in the article, have been deposed and have denied the accuracy of the reports:

Sarah Shields Jobe denied the truth of virtually everything said about her in the article except that she had worked briefly at Liberty Lobby 10 or 15 years ago. She said she did not set up any file such as is described in the article (Jobe Depo., p. 9) and that Carto did not order her to do anything (*Id*. at 6). She testified that she had not taken any files from Liberty Lobby nor given any files to Jack Anderson's reporters. (*Id*. at 10-11).

Winfield Scott Stanley, Jr. testified that the statements about the plaintiffs attributed to him in the article were "manufacturered," "fake," "phoney," "spurious," "fraudulent." Stanley Depo., p. 10.

Vincent A. Drosdik, III, testified that the story attributed to him by *The Investigator* was taken out of context and was incomplete. (Drosdik Depo., pp. 8, 10.) He said that the paragraphs in the article were deceptive (*Id*. at 10) and that "it was incomplete and unethical and there was no excuse for it" (*Id*. at 14).

Other instances of disputes over the truth of matter printed in the article include the following:

That Carto is a Nazi is denied in Carto Aff., paragraph 10.

That Carto owns or owned Government Educational Foundation is denied in Carto Aff., paragraph 4.

That Liberty Lobby every paid $6000 a month rent to Government Educational Foundation is denied in Carto Aff., paragraph 4. Falsity averred in Complaint, denied in Answer and Bermant Aff.

That Liberty Lobby was fined $11,000 by the Federal Election Commission for a criminal act. Falsity averred in Complaint, denied in Answer.

That one-way see-through mirrors are used by Carto to watch employees. Denied in Carto Aff., paragraph 6.

That Carto conducts business by conference calls from public telephones. Denied in Carto Aff., paragraph 5.

The plaintiffs submit that there are many other instances in which statements made in the article have been claimed true by the defendants in their Answer and in Bermant's Affidavit, and false by the plaintiffs in their Complaint, Answers to Interrogatories, and in depositions and affidavits made a part of the record.

6. Whether the defendants knowingly or recklessly published the false statements concerning the plaintiffs.

This factual issue, which goes to the heart of the question of "actual malice" in a libel suit, arises not only, for example, from the points already raised in paragraphs 4 and 5 of this Statement of Genuine Issues, but also from the totality of evidence now in the record. Significant differences between the extant drafts of the article and the published verison show, for instance, unexplained additions of damaging statements concerning the plaintiffs. (Exhibits to Anderson and Bermant Depositions.)

A further example arises from the statement on page 41 of the article that, "Not long ago, a free-lance reporter for *The Spotlight*, J. Michael Dunsmore, told *The Incestigator* that a lead story in the May 21, 1976 issue of Carto's tabloid was a total hoax." But Charles Bermant testified that he never talked to Dunsmore (who therefore never "told *The Incestigator*" any-

thing) (Bermant Depo., p. 129), and that instead the information was given to him by one Robert Eringer (*Id*. at 112).

Plaintiffs emphasize that the factual issues listed here are not the only ones going to the proof of actual malice on the part of the defendants.

7. Whether the defendants, in preparing and publishing the article, departed from their own standards of investigation and verification.

Anderson testified, "We have strict rules," as to verification of information. (Anderson Depo., p. 73.) The rules are emphasized on a regular basis to Anderson's reporters, and were "absolutely" imparted to Charles Bermant, who was the author of, and in charge of the preparation of, the article. (*Id*. at 74.)

Anderson testified that his rules included:

> Every fact must be checked out.
>
> It must be true.
>
> It must be verified by more than one source.
>
> The sources must be separate (in the sense of independent).
>
> *Id*.
>
> A. We don't believe anyone. We have to double check everything.
>
> Q. Is it true to say, then, that once you have heard the same story about the same fact from two different sources, that you then consider that it is fit to publish it?
>
> A. Not necessarily. The two sources may have gotten their information from the same source. We would have to be satisfied that the information came from two completely different sources.
>
> *Id*. at 99-100.

Anderson testified that verification of information in the article was Bermant's responsibility. *Id*. at 67. Bermant was responsible for the Carto article, and any rewriting would have had to have been submitted for his approval. *Id*. at 34. Bermant was the "first and only person to work on the article." *Id*. at 44.

Bermant swore that nobody, to his knowledge, other than himself, made any verification of information which Bermant in-

cluded in the articles. Bermant Depo., p. 28. Bermant also testified that he did not ask any other person to verify anything in the article, and that he knows of no one ever being assigned to verify statements in his draft or Obert's draft. *Id*. at 131. Obert did not change anything substantially or factually; he just rearranged and changed emphasis. *Id*. at 124.

Bermant, as the only person responsible for verification or confirmation, made the following specific admissions during his deposition:

1) He made no effort to determine names of "Nazis" who had infiltrated Liberty Lobby, and he could not name any. (p. 101)

2) Nobody contacted Scott Stanley to verify the highly damaging quotations attributed to him. (pp. 103 and 106)

3) Bermant made no attempt to talk with Vincent Drosdick. (p. 116)

4) Bermant made no attempt to talk with Sarah Jobe. (p. 120)

5) Bermant did not talk to J. Michael Dunsmore. (p. 129)

6) Bermant did not get from Robert Eringer (who Bermant said was a source of a considerable amount of Bermant's information) the names of any sources who could confirm Eringer's allegations. (p. 114)

In addition to the failures of verification cited, Bermant's testimony as a whole reveals little if anything in the way of verification, and what verification (if any) that did occur does not seem to have been by independent sources. The plaintiffs respectfully suggest that a reading of the entire record is necessary to show the contradictory nature of the testimony of the defendants and their witnesses.

8. Whether the defendants used government documents exclusively, or whether they used other sources for *The Investigator* article on Carto and Liberty Lobby.

Anderson testified that "we relied entirely on government documents" in the article, and that "they were based on FBI files but there may have been other government documents." Anderson Depo., p. 75.

Charles Bermant, while claiming that he used a number of other sources, never states that he used any government documents, including FBI files, as a basis for the article about the plaintiffs. Numerous other inconsistencies occur between the depositions of Bermant and Anderson.

9. Whether the sources relied upon by the defendants were reliable.

In their Statement of Material Facts which they allege are not in dispute, defendants state:

> "20. The sources Mr. Bermant relied upon were reliable. In addition, every one of the challenged statements in the articles was derived from a reliable source."
>
> That statement is manifestly in dispute, as has already been shown in this Statement of Genuine Issues, paragraph 5. The so-called "undisputed" fact is a mere assertion, without foundation in the record, by the defendants.

10. Whether the defendants' assertion in paragraph 21 of their Statement of Material Facts that "Congressmen . . . and others have consistently reported that plaintiffs are anti-Semitic, fascist and rascist" is in dispute. Plaintiffs contend that it is clearly disputed, as is demonstrated by the defendants' own admission as established fact in paragraph 1 of their Statement of Material Facts that "Plaintiff Liberty Lobby, Inc. ('Liberty Lobby') is a not-for-profit corporation" which (paragraph 2) since 1955 has "advocated and promoted patriotism, nationalism, lawfulness [and] protection of the national interest . . ." Furthermore, defendants' reporter, Bermant, interviewed Congressman George Hansen; Bermant's interview notes are an exhibit not only to his deposition but also to the Opposition to Motion for Summary Judgment, and they show that Congressman Hansen passed off the "Nazi" allegations as a "knee jerk reaction." The unidentified "confidential source" interviewed by Bermant, the notes of which interview are Exhibit A to the Opposition, show that source as denying that the plaintiffs are anti-Semitic, fascist, or rascist. So it is clear from materials produced by the

defendants themselves that there was no consistency among their sources on that point.

Respectfully submitted,

October 8, 1982

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APPENDIX Q
Order of the United States District Court for the District of Columbia (May 17, 1982)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LIBERTY LOBBY, *et al.*,	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	Civil Action
JACK ANDERSON, *et al.*,	)	No. 81-2240
	)	
Defendants	)	
	)	
	)	
	)	

ORDER DENYING MOTION TO DISMISS OR ALTERNATIVELY FOR SUMMARY JUDGMENT

This is an action for libel and conversion brought against Jack Anderson, Bill E. Adkins, and other individuals. Plaintiffs are an organization, Liberty Lobby, and Willis Carto, its treasurer and founder. Count I of the complaint charges Anderson and the other defendants with publishing a magazine, *The Investigator*, which in October 1981 included two articles containing 30 statements allegedly libelous as to one or both of the plaintiffs. Count II of the complaint charges Anderson with conversion of various Liberty Lobby files.

The defendants have moved for dismissal or alternatively for summary judgment as to Count I contending that it embraces and complains about (i) statements which are expressions of opinion that are absolutely privileged under the first amend-

ment, or (ii) statements which are not defamatory as a matter of law.[1] In addition, the defendant Adkins moves to dismiss or for summary judgment on the grounds that he has no connection with or involvement in the editorial content of the magazine.

These issues will be addressed in turn.

A.

The first claim is that some of the allegedly defamatory statements are expressions of opinion and, as such, are protected against libel actions by the first amendment. The defendants cite the Supreme Court's pronouncement in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974): "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

The "opinion" statements include descriptions of Carto and his organization such as the following: "neo-Nazi cabal"; "Hitler fan"; "right-wing"; "virulant anti-Semitism"; "fascist propaganda"; "adulation of Adolf Hitler"; "denigration of democracy and agitation for an authoritarian New Order"; a desire to "expose the 'Jew-Zionist' international bankers' conspiracy"; "the leading anti-Semite in the country"; and promotion of "the forced deportation of all blacks to Africa." In addition, the article contained an illustration which, the plaintiffs allege, depicts a man bearing a strong resemblance to Adolf Hitler with a caption suggesting that it is actually a drawing of plaintiff Carto.

This Court is not convinced that these are merely "opinion" statements which are not actionable. The defendants chiefly rely on *Buckley v. Littell*, 539 F.2d 882, 894 (2d Cir. 1976), holding that the terms "fascist", "fellow traveler" or member of the "radical right" are opinions because they refer to "concepts whose content is so debatable, loose and varying, that they are insusceptible to proof of truth or falsity." There is considerable

---

1. The defendants also attached a number of exhibits to their motion which suggest that some of the allegedly libelous statements are true. However, they explicitly state that truth -- a complete defense to an allegation of defamation -- is not a basis for their motion.

authority, however, for the proposition that statements such as those made about the plaintiffs give rise to a cause of action for defamation. *See Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 655 (D.C.Cir. 1966), *citing Christopher v. American News Co.*, 171 F.2d 275 (7th Cir. 1948), for the holding that it is actionable to call a person a "Nazi". *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 331 n.4 (1974) (dictum that the accusations that one is a "Leninist" and a "communist-fronter" are "generally considered defamatory"); W. Prosser, *Law of Torts* 744 (4th ed. 1971) (stating that accusations of Communist affiliation or sympathy are "all but universally regarded as clearly defamatory"). Moreover, while the terms "fascist", "fellow traveler", or "radical right" may, in the *Buckley* court's view, be incapable of precise meaning, such descriptions as, for instance, a "Hitler fan" is, in this Court's view, capable of proof as to truth or falsity. *See Afro-American Publishing Co. v. Jaffe*, 366 F.2d at 655 (holding that the description of plaintiff as a "bigot" and "racially prejudiced" is actionable).

But even if the defendants were correct in their characterization of these statements, the constitutional protection for expressions of opinion is not absolute. Opinion statements are libelous if made with malice. Such was true for the common law antecedent of the constitutional privilege -- the privilege of "fair comment"[2] -- and it is also the case for constitutionally protected opinions. As stated in *Goldwater v. Ginzburg*, 261 F.Supp. 784 (S.D.N.Y. 1966) *aff'd.*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970): "[E]ven if all the statements were opinions only, proof of actual malice would take away from defendants that privilege conferred by the *Sullivan* principle."[3]

---

2. Phillips v. Evening Star Co., 424 A.2d 78, 88 (D.C. 1980). *See also* Buckley v. Vidal, 327 F.Supp. 1051, 1053 (S.D.N.Y., 1971), where it is stated: "The comment must be fair. It must be a reasonable inference from the facts truly stated . . . ."

3. The "privilege conferred by the *Sullivan* principle" is that for public figures and officials, the plaintiff must show "actual malice", defined as knowledge of the statement's falsity or reckless disregard of truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In this case, the defendants have not yet argued that they are entitled to the *Sullivan* privilege.

See also Loeb v. *Globe Newspaper Co.*, 489 F.Supp. 481 (D.Mass. 1980).

The defendants have also alleged defamation based on a number of statements which even the defendants do not dispute are factual statements. If these other assertions are false, and -- if the *Sullivan* privilege applies here -- they were made with actual malice then the "opinion" statements, which are based on the factual description of the plaintiffs, are also actionable. The defendants, in other words, have placed the cart before the horse: the "opinion" statements are constitutionally protected only if the defendants can show that they are not subject to liability for the contested factual statements. Because, as will be seen below, no such showing has been made, the motion for dismissal or for summary judgment is denied.

B.

The defendants also claim that a number of other statements' set forth in Count I of the complaint, are not defamatory even if they are false. In this jurisdiction, a publication is considered defamatory "if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Olinger* v. *American Savings and Loan Association*, 409 F.2d 142, 144 (D.C.Cir. 1969). Whether a communication is capable of bearing a defamatory meaning is a question for the court to decide. *Harrison* v. *Washington Post Co.*, 391 A.2d 781 (D.C. 1978); *Restatement (Second) of Torts* § 614 (1977).

The Court, having reviewed all of the disputed statements, finds that dismissal on this ground would not be appropriate.

C.

Adkins' motion to dismiss or for summary judgment must also be denied. He asserts in an affidavit that he had no editorial role in the publication of the Carto article. However, that claim is challenged in an affidavit of the former editor of the magazine. Because the affidavits indicate the existence of a genuine issue of

material fact on the question of Adkins' involvement, summary judgment is not appropriate. *See Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962).

Accordingly, it is this 17th day of May 1982

ORDERED that the motions of the defendants to dismiss or, alternatively, for summary judgment are denied.

Barrington D. Parker
United States District Judge

Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

— v. —

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

On Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Can the constitutional requirement that evidence of actual malice in a public-figure libel case be "clear and convincing" be disregarded for purposes of a defendant's motion for summary judgment?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. The Investigator Publishing Company is a Texas corporation. It does not have any subsidiaries or affiliates.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 746 F.2d 1563 (D.C. Cir. 1984). The opinion of the District Court is reported at 562 F. Supp. 201 (D.D.C. 1983).

JURISDICTION

Jurisdiction of this Court to review the judgment of the Court of Appeals is by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1) (1982). Petitioners' petition for a writ of *certiorari* was granted by this Court on June 3, 1985.

STATUTORY PROVISION INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> *Motion and Proceedings Thereon.* The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Civ. P. 56(c).

STATEMENT OF THE CASE

Petitioner Jack Anderson is a well-known reporter and publisher. In 1981, he served as publisher of a now defunct magazine called *The Investigator*, owned by petitioner Investigator Publishing Company. Petitioner Adkins was President and Chief Executive Officer of the Company.

Respondent Liberty Lobby, Inc. is a self-styled political action organization, whose stated aims are to "advocate[] and promote[] patriotism, nationalism, lawfulness [and] protection of the national interests of the United States and the economic interests of its citizens. . . ." (J.A. 12 [Complaint, Count One, ¶12].) Respondent Willis A. Carto is Liberty Lobby's founder and Treasurer. Since its inception in 1955, Liberty Lobby has been engaged in political lobbying and the dissemination of its views on what have been delicately described as "highly controversial subjects."[1]

Carto and Liberty Lobby disseminate their views through their own extensive media network. In 1981, this network included *The Spotlight*, a national newspaper with 345,000 subscribers; "This is Liberty Lobby," a daily radio commentary broadcast on 460 radio stations; and a weekly television program broadcast on 30 stations. Liberty Lobby also sells, publishes or distributes a multitude of publications, including "Debunking the Genocide Myth"; "The Hoax of the Twentieth Century"; "The White Paper on the ADL"; and *Imperium*, a book written by Francis Parker Yockey, for which Carto wrote a lengthy introduction.

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1. Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1968). In that case, the present respondents unsuccessfully sought to enjoin Anderson and the late Drew Pearson, from publishing a newspaper column based on certain Liberty Lobby documents. Liberty Lobby's chairman had previously sued Anderson and Pearson for libel, claiming that an article charging him with anti-Semitism had defamed him. The court awarded summary judgment to Anderson and Pearson on the ground that the column was substantially true. Dall v. Pearson, 246 F. Supp. 812 (D.D.C. 1963).

The October 1981 issue of the *The Investigator* included articles titled "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles described Liberty Lobby and Carto as fascist, neo-Nazi, anti-Semitic and racist. Respondents filed a diversity action in the United States District Court for the District of Columbia, claiming that thirty passages in the articles had defamed them. The complaint sought $2 million in general damages and $22 million in punitive damages.[2]

In the year and a quarter granted for discovery,[3] respondents deposed, among other persons, Anderson and Charles Bermant, the author of the articles.[4] Prior to Bermant's deposition, respondents were provided an affidavit by Bermant, describing the steps he had taken in researching and writing the articles, together with a 43-page appendix setting forth in detail the sources on which he had relied for each of the thirty allegedly defamatory statements. Respondents were also provided access to a box of written materials that Bermant had gathered during his research. (J.A. 44-45 [Bermant Aff. ¶ 11].)

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2. The complaint originally named two additional defendants, who were subsequently dismissed under Rule 41(a). In addition to the defamation claim, the complaint also charged Anderson alone with unlawful conversion of certain Liberty Lobby files. The District Court granted Anderson summary judgment on this claim, holding that the claim was barred by the statute of limitations. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 210 (D.D.C. 1983). Respondents did not appeal.

3. The District Court initially ordered that discovery be completed by September 30, 1982, but later extended the discovery cut-off to October 15, 1982.

4. The articles were also accompanied by an introduction, captioned "Did *Mein Kampf* Spawn Yockey's *Imperium*, A Book Revived by Carto's Liberty Lobby?" This introduction, signed "The Editors," was written by Anderson based on materials supplied by Bermant. (J.A. 232 [Bermant Dep. Tr. 17].)

Bermant's affidavit and attachment and the depositions collectively establish the following facts, none of which respondents subsequently controverted by affidavits or otherwise:

After receiving a journalism degree and working as a newspaper reporter for several years, Charles Bermant began editorial duties for *The Investigator* in March 1981. (J.A. 43-44 [Bermant Aff. ¶¶ 2,4,5-7].)[5] In April, Liberty Lobby and Carto attracted widespread attention when it was revealed that Warren Richardson, a nominee for Assistant Secretary of Health and Human Services, had previously served as Liberty Lobby's general counsel.[6] In May 1981, Bermant was assigned to work on articles on Carto and Yockey.

Bermant spent over a month working on the articles. His first step was to file requests with several government agencies under the Freedom of Information Act, 5 U.S.C. § 552, from which he ultimately received more than a thousand pages of documents and newspaper clippings. (J.A. 44 [Bermant Aff. ¶¶ 9,10].) He collected additional published materials about Liberty Lobby, Carto and Yockey from Anderson's office files, newspaper files and libraries, including the Library of Congress. (*Id.*) These materials included articles that had previously been published in the *National Review*, the *Washington Post*, the *Washington Star*, the *Los Angeles Times*, and *True* magazine, as well as statements in the *Congressional Record*. Bermant also read Carto's introduction to *Imperium*, and much of the book as well. (J.A. 44-45 [Bermant Aff. ¶11].)

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5. In addition to writing, these duties included answering telephone inquiries from writers who had story ideas, and requesting the writers to send him written materials for his evaluation and possible use. (J.A. 261 [Bermant Dep. Tr. 71].)

6. Although Mr. Richardson subsequently condemned as "morally repugnant" what he termed Liberty Lobby's "anti-Jewish, racist actions," his nomination was ultimately withdrawn. "Health Post Choice Withdraws Amid Controversy," N.Y. Times, Apr. 26, 1981, at A21, col. 1; "Liberty Lobby's Ex-Lawyer Ends HHS Quest," Washington Post, Apr. 25, 1981 at A1.

After reviewing this written material, Bermant contacted personnel at the Anti-Defamation League and the Federal Election Commission and also undertook numerous personal and telephone interviews. (J.A. 44 [Bermant Aff. ¶ 10].) Bermant also spoke with a freelance author named Robert Eringer, who told him that he had recently completed a story about Liberty Lobby. (J.A. 261 [Bermant Dep. Tr. 70-71].) At Bermant's request, Eringer mailed a draft of the article, together with a book he had published and investigatory articles he had written on other subjects. (J.A. 262 [Bermant Dep. Tr. 71].) Bermant checked Eringer's article against other published sources and used portions of this material in his article, for which Eringer was paid $250.[7] Answers of Defendant The Investigator Publishing Co. to First Set of Plaintiffs' Interrogatories at 3, 6, 7.

Bermant also interviewed and received court documents from William Cox, an attorney who was representing a plaintiff in litigation against an alleged Carto "front" organization.

Bermant tried several times to secure an interview with Carto, but his repeated telephone calls went unanswered. (J.A. 45 [Bermant Aff. ¶ 13].) He was, however, allowed to conduct a lengthy interview with the chairman of Liberty Lobby's Policy Board. (*Id.*)

Bermant's affidavit stated that he continued to believe that the challenged articles were true and accurate, just as he had at the time he wrote them. (J.A. 46 [Bermant Aff. ¶ 20].) Anderson testified that he had relied on Bermant for the accuracy of these articles. (J.A. 212-13 [Anderson Dep. Tr. 101].)

Petitioners then moved for summary judgment on the ground that respondents were public figures and could not show with the "convincing clarity" required by *New York*

7. It was Anderson's policy to pay for information only if the recipient was "a professional newsman, who was doing a professional job." (J.A. 199 [Anderson Dep. Tr. 76].)

Times Co. v. Sullivan, 376 U.S. 254 (1964), and subsequent cases, that the challenged articles had been published with knowledge that they were false or that petitioners "in fact entertained serious doubts" as to their truth. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Petitioners also argued that respondents were "libel proof" because Liberty Lobby's reputation had already been irreparably tarnished by twenty years of articles and other public comments repeatedly accusing them of anti-Semitic and racist views and activities.

Respondents filed three affidavits in opposition to the motion, after having been granted an extension of time in which to undertake further discovery.

The District Court ruled that "[t]he material underlying facts necessary for disposition of this motion . . . are uncontested," 562 F. Supp. at 205, and granted petitioners' motion for summary judgment on the entire complaint.[8] After examining Bermant's affidavit and the accompanying 43-page appendix, the District Court found that "as a matter of law the information contained within these sources substantiates each allegation contained in the articles." 562 F. Supp. at 209. The court held that the respondents' three affidavits had done no more than controvert the truth or even-handedness of some of the allegations made by the sources on which Bermant had relied. Such a showing, the District Court held, was insufficient to create a factual issue of malice, especially in light of petitioners' "finely etched effort presenting in careful detail the journalistic research underlying each statement." *Id.* The District Court found further support for its conclusion in "the reality that plaintiffs manage to attack only a small proportion of the sources that defendants relied upon." *Id.*

The Court of Appeals reversed the District Court's judgment as to nine of the thirty allegations of defamation.

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8. As noted above at note 2, the District Court held that respondents' conversion claim against Anderson was time-barred, a holding from which respondents did not appeal.

Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984). Although respondents no longer questioned their status as public figures, and must, therefore, under *New York Times* and *St. Amant* carry the burden *at trial* of establishing with "convincing clarity" that the alleged defamatory statements about them had been published with "actual knowlege" of their falsity or with "serious doubt" about their truth, the Court of Appeals held that a lesser showing was sufficient to avoid a summary judgment. Similarly, while the Court of Appeals recognized that, under *Bose Corp. v. Consumers Union of United States, Inc.*, ____ U.S. ____, 104 S. Ct. 1949 (1984), courts must "independently decide" at the trial stage whether the *New York Times-St. Amant* showing had been made, it held that such an "independent judicial determination" was "incompatible with the preliminary nature of the summary judgment inquiry." 746 F.2d at 1571.

While rejecting the "convincing clarity" standard and the "independent judicial determination" requirement at the summary judgment stage, the Court of Appeals nevertheless held, on the basis of the affidavits and other materials submitted by the parties, that no reasonable jury could find actionable twenty-one of the articles' allegations. These included, among others, that Carto is "anti-Semitic," "hides in the shadows of reclusion and anonymity," and is a "Hitler fan"; that a $50,000 "reward" offered to anyone who could prove the existence of the Holocaust was a "gimmick"; that Liberty Lobby was a "nest of Nazis"; and that Liberty Lobby had violated federal election laws.[9]

With respect to the remaining allegations, the Court of Appeals held respondents were not "libel proof" and that under its reduced standard for determining what issues to send to trial "a jury could reasonably conclude" that the

9. These allegations were variously held to be nondefamatory, 746 F.2d at 1572; constitutionally protected opinion, *id.*, or based upon "reputable sources" whose reliability petitioners had no reason to doubt, *id.* at 1576. Respondents have not challenged the propriety of summary judgment as to any of these allegations.

articles were published with actual knowledge of their falsity or with disregard for their truth or falsity. 746 F.2d at 1577-78. The appellate court therefore reversed the grant of summary judgment and remanded to the District Court for trial on these allegations. *Id*. at 1579. After a petition for rehearing with a suggestion for rehearing *en banc* was denied, petitioners sought a writ of *certiorari*, which was granted by this Court on June 3, 1985.[10]

SUMMARY OF ARGUMENT

The First Amendment mandates that a public-figure libel plaintiff may not prevail at trial unless he or she demonstrates with "convincing clarity" that the allegedly defamatory statement was made with "actual malice." This heightened burden of proof is necessary to ensure the robust discussion of public issues crucial to our democracy.

By ignoring this mandate at the summary judgment stage, the Court of Appeals created a special rule disadvantaging libel defendants on summary judgment. This rule is as unsupported by precedent as it is by logic. In all areas of the law, civil and criminal, it is firmly established that a plaintiff's ultimate burden of proof must be taken into account in determining whether his or her claim should be submitted to a jury. This is true in the libel area as well. The standard for granting summary judgment under Rule 56(c), that "there is no genuine issue as to any material fact," as well as that Rule's purpose "to pierce the allegations" of "notice" pleadings, is identical to that for directed verdict and therefore requires that a court's determination of whether there is a genuine need for trial incorporate the heightened burden of proof imposed on public-figure plaintiffs.

10. Although the petition sought review on the "libel-proof" issue as well, *certiorari* was limited to the issue of whether the constitutional requirement that evidence of actual malice in a public-figure libel case be "clear and convincing" can be disregarded for purposes of a defendant's motion for summary judgment.

In adopting its special rule for libel cases, the Court of Appeals disregarded the fundamental principles underlying summary judgment. Summary judgment is designed to assess the proof that the parties could muster at trial. It is grounded in the policies of the Federal Rules of Civil Procedure that contemplate liberal discovery. Consequently, there is no basis for making summary judgment the truncated process the Court of Appeals thought it should be in libel cases. The Court of Appeals' approach would lead to needless and wasteful trials in cases in which it is clear that a party could not ultimately prevail.

In evaluating summary judgment motions in actual malice cases, other courts have consistently incorporated a public-figure plaintiff's heightened burden of proof, while still continuing to afford nonmoving parties the traditional protections due on summary judgment. Application of this neutral summary judgment rule implies no special protections for libel defendants beyond the constitutional protections embodied in the substantive laws, and it neither compels nor forbids the award of summary judgment in appropriate cases. As this Court and other federal courts have recognized in a variety of settings, summary judgment is not inappropriate merely because the state of mind or credibility of witnesses is alleged to be at issue. And, in any event, this Court's recognition of the special need for independent judicial scrutiny of issues of constitutional fact should apply with equal force to summary judgment determinations in public-figure libel cases.

The District Court's award of summary judgment to petitioners was correct because respondents failed to adduce any evidence, let alone "clear and convincing evidence," that petitioners' articles were published with "actual malice." The Court of Appeals found that a barrage of grave allegations going to the heart of respondents' operation came from reputable sources, and could lead no reasonable jury to doubt petitioners' belief that the picture of respondents as Hitler-inspired racists and anti-Semites was accurate. In light of these findings, no reasonable jury

could doubt petitioners' lack of "actual malice" in publishing the remaining allegations, which merely provided details of the larger picture.

Even if examined without reference to the substantially similar allegations on which summary judgment was upheld, nothing about the content of, or the sources for, the remaining allegations provided any "obvious reason to doubt" their reliability. Petitioners' sources for the information afforded no basis for doubting the reliability of those sources, especially in light of their corroboration by numerous other highly reputable sources. Moreover, the information itself was far from being "so inherently improbable that only a reckless man would have put [it] in circulation." Thus, there was no basis for the Court of Appeals' conclusion that a reasonable jury "could" find evidence of actual malice even on the improperly reduced standard the court applied.

ARGUMENT

I. Summary Judgment Must Be Awarded To A Defendant Unless A Public-Figure Plaintiff Has Adduced Evidence From Which A Reasonable Jury Could Find, With Convincing Clarity, That The Defendant Acted With Actual Malice.

A. The First Amendment Requires A Public-Figure Libel Plaintiff To Demonstrate With Clear and Convincing Evidence That A Defamatory Statement Was Made With Knowledge That It Was False Or With Reckless Disregard For Its Truth Or Falsity.

Twenty-one years ago, this Court held that common law principles governing defamation were inadequate to assure that the freedoms of speech and press have the " 'breathing space' that they 'need to survive'." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). In order to "insure the ascertainment and publication of the truth

about public affairs," this Court concluded that erroneous publications, as well as truthful ones, must be granted First Amendment protection. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). The Court held that "neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies." *Id.*

These policies, this Court held, require that a public figure may recover for an allegedly defamatory statement only upon a showing that the statement was made with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. at 279-80. And, as a further safeguard, the Court required that this showing be made with "the convincing clarity which the constitutional standard demands." *Id.* at 285-86. *See also Herbert v. Lando*, 441 U.S. 153, 170 (1979); *Bose Corp. v. Consumers Union of United States, Inc.*, _____ U.S. _____, 104 S. Ct. 1949, 1965 (1984).

When the consequences of an erroneous verdict may destroy precious freedoms, this Court has refused to tolerate the risk of error inherent in the ordinary "preponderance of the evidence" standard. Instead, the Court has ruled that the risk of an erroneous decision must be further limited by imposing on the plaintiff the extraordinary burden of establishing its case by "clear and convincing" evidence. *See, e.g., Addington v. Texas*, 441 U.S. 418, 424 (1979) (civil commitment); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation).

In First Amendment cases, the "convincing clarity" standard is based on the recognition that "the freedom to speak one's mind is not only an aspect of individual liberty -- and thus a good unto itself -- but also is essential to the common quest for truth and the vitality of society as a whole." *Bose v. Consumers Union*, _____ U.S. at _____, 104 S.Ct. at 1961. The constitutional requirement that libel judgments on behalf of public figures must be supported by

"clear and convincing" evidence is based on the same considerations of public welfare that underlie the requirement that public figures establish "actual malice": any lesser showing "dampens the vigor and limits the variety of public debate." *New York Times v. Sullivan*, 376 U.S. at 279. When public debate is involved, the damage to society from an erroneous verdict for the plaintiff is far greater than in ordinary tort litigation, where an erroneous verdict in favor of one party is considered no more serious than an erroneous verdict in favor of the other. Only last year, in *Bose v. Consumers Union*, this Court again reaffirmed the "convincing clarity" requirement as one of the fundamental safeguards of "the precious liberties established and ordained by the Constitution." ____ U.S. at ____, 104 S. Ct. at 1965.

B. A Plaintiff's Heightened Burden Of Proof Must Be Considered In Determining A Motion For Directed Verdict.

The Court of Appeals recognized that unless a public figure adduces "clear and convincing evidence" of actual malice, a jury may not consider the case, and a directed verdict must be entered for the defendant. 746 F.2d at 1571. This recognition was unquestionably correct, for it is well settled that the creation of an extraordinary burden of proof carries with it the "concomitant duty . . . to consider the applicable burden when deciding whether to send a case to the jury." *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972) (Friendly, C.J.).

This principle has been routinely applied in civil cases, where courts have evaluated a motion under Rule 50 for a directed verdict or for judgment n.o.v. in light of the "clear and convincing evidence" burden that must be met at trial. *See, e.g., United States Fire Ins. Co. v. Royal Ins. Co.* 759 F.2d 306, 312 (3d Cir. 1985) (fraud; directed verdict for defendant); *Roginsky v. Richardson-Merrell, Inc.*, 378

F.2d 832, 850-51 (2d Cir. 1967) (punitive damages; directed verdict for defendant).

The same principle is the "prevailing criterion" in criminal cases, where courts must evaluate a motion for judgment of acquittal in light of the prosecution's burden of proving at trial guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 n.11 (1979).[11]

Thus, even where the special protections afforded by the First Amendment are not relevant, the decision whether to refer a case to a jury must draw its content from the ultimate standard of proof at trial.

C. The Standard For Summary Judgment Under Rule 56 Is Identical To That For Directed Verdict And Therefore Incorporates A Public-Figure Plaintiff's Heightened Burden Of Proof.

Despite its recognition of the rule that courts must consider the applicable burden of proof in deciding whether to send a case to the jury, the Court of Appeals held, without citing any supporting authority,[12] that district courts must ignore the plaintiff's burden of proof at the summary judgment stage. This holding is as devoid of logic as it is unsupported by authority.

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11. United States v. Davis, 562 F.2d 81, 683-84 (D.C. Cir. 1977), cited by the Court of Appeals (746 F.2d at 1571) merely reaffirms this well-established principle. It provides no support for distinguishing between the standards for summary judgment and directed verdict in *civil* cases. That "'probable cause' is sufficient to take the case to trial", in a *criminal* case (746 F.2d at 1571, citing Brown v. Department of Justice, 715 F.2d 662, 667 (D.C. Cir. 1983)) is beside the point. The criminal law provides no procedure equivalent to civil law's summary judgment for pre-trial challenges to the adequacy of the prosecution's case. *See* Costello v. United States, 350 U.S. 359 (1956).

12. As noted above at note 11, the authorities cited by the Court of Appeals either are irrelevant to summary judgment or reaffirm the rule governing directed verdict. To the extent that the Court of Appeals relied on Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970), this reliance is simply bewildering. *See infra* note 16.

As the Advisory Committee on Civil Rules of Practice and Procedure of the Judicial Conference of the United States emphasized with respect to Rule 56, "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof *in order to see whether there is a genuine need for trial*." 31 F.R.D. 621, 648 (1962) (emphasis added).

The language of Rule 56 provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This standard for granting summary judgment must be applied in light of a party's ultimate burden of proof at trial. Under Rule 56, a factual dispute is only "genuine" and "material" when the nonmoving party provides "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968).

It has therefore been widely recognized, both by this Court and by respected commentators (including the principal author of the Federal Rules) that the standards applicable to motions for summary judgment and motions for a directed verdict under Rule 50 are the same. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944); C. Clark, Code Pleading § 88, at 566 (2d ed. 1947); Louis, "Federal Summary Judgment Doctrine: A Critical Analysis," 83 Yale L.J. 745 (1974); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.02[10], at 56-43 to 56-44, ¶ 56.04[2], at 56-74 to 56-75, ¶ 56.15[3], at 56-479 to 56-480 (2d ed. 1985) [hereinafter cited as Moore's Federal Practice]; 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2712, at 569-71 (2d ed. 1983) [hereinafter cited as Wright & Miller]; *see generally*, Schwarzer, "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact," 99 F.R.D.

465, 482 (1984) ("[i]n effect the opposing party must rebut the moving party's showing with evidence which would preclude a directed verdict or judgment n.o.v. for the moving party" (footnote omitted)) [hereinafter cited as Schwarzer].

As these authorities recognize, both motions look to the existence of questions of material fact to be resolved by the jury and seek to remove from the fact finder those cases in which there is no legitimate controversy under applicable law. *See, e.g., United States v. General Motors Corp.*, 518 F.2d 420, 442 (D.C. Cir. 1975) (where "the established facts and relevant presumptions would have entitled [the moving party] to a directed verdict at trial, he is entitled to a summary judgment under Rule 56"). The purpose of both the summary judgment and directed verdict procedures -- to weed out unnecessary trials -- would be subverted by permitting a jury to resolve issues that could not alter a court's ultimate disposition of a case on the law.

In determining whether a trial is "necessary," for the purposes of Rule 56, courts have imposed significant limitations to assure that parties are not denied a reasonable opportunity to present their case at trial. They have therefore placed upon the moving party the burden of demonstrating that there are no genuine issues of material fact and have required that all disputed facts and inferences must be construed "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). But the formidable burden that movants must meet is no different from the burden imposed on a party who seeks a directed verdict. *See* 5A Moore's Federal Practice, *supra*, ¶ 50.02[1], at 50-26.

To be sure, entry of summary judgment deprives the nonmoving party of his "day in court," but neither the interests of the litigants nor those of the judicial system are well served by "exposing the litigants to unnecessary delay, work and expense in going to trial when the trial judge

would be bound to direct a verdict in movant's favor after all evidence is adduced." *Chambers v. United States*, 357 F.2d 224, 227 (8th Cir. 1966).

That directed verdicts are entered after the plaintiff has had an opportunity to complete discovery and marshall his or her evidence in a trial is likewise no reason for tolerating a lesser showing by the plaintiff at the summary judgment stage than at trial. Rule 56(f) gives a party opposing summary judgment ample opportunity to complete discovery and marshall the evidence so that he or she can present sufficient facts to justify a trial.[13]

In the present case, respondents were granted an extension of time in which to conclude discovery before opposing petitioner's motion; they sought no additional evidence to oppose the motion. There is no reason to allow respondents to go forward with a case that could not be submitted to the jury. To do so would be to encourage an exercise in futility, wasteful not only to the litigants, but to the courts and to other litigants whose claims must be deferred while the empty ritual of a hopeless trial is played out. Justice Frankfurter's remarks on the same subject are particularly appropriate:

> The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.

Wilkerson v. McCarthy, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring).

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13. Fed. R. Civ. P. 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

D. The Court Of Appeals Misconceived The Nature And Purpose Of Summary Judgment.

The rationale advanced by the Court of Appeals to support its unprecedented restructuring of the summary judgment rule does not comport with the purpose of Rule 56 or modern practice under that rule.

The Court of Appeals stated: "Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well." 746 F.2d at 1570. That such a consequence should be of concern lays bare the Court of Appeals' misunderstanding of the purpose of summary judgment. An evaluation of the weight of the defendant's uncontroverted facts is precisely the inquiry mandated by Rule 56(c) to determine, under the language of that rule, if "the moving party is entitled to a judgment as a matter of law" when no disputed material facts are found to exist. *See* 10 Wright & Miller, *supra*, § 2712, at 571-73. Moreover, summary judgment is not properly "a search for a minimum of *facts* supporting the plaintiff's case," but rather is a search for those *contested* facts which, if found to be as alleged by a nonmoving party, would permit a jury to find for that party at trial.

The Court of Appeals' concern that recognition of a heightened burden of proof on summary judgment would "force the plaintiff to try his entire case" prematurely "in pretrial affidavits and depositions," 746 F.2d at 1570, is similarly ill founded. Rule 56(e) was amended in 1963 to require that, "[w]hen a motion for summary judgment is made . . ., an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or . . . otherwise . . ., must set forth specific facts showing that there is a genuine issue for trial." It is black letter law, based upon this provision, that a party opposing a summary judgment motion may not sit back and

withhold proof of his or her claims until trial; nor may that party defeat a motion on the basis of materials that are "conjectural" or "speculative" as to what the proof at trial may demonstrate. 6 Moore's Federal Practice, *supra*, ¶ 56.15[3], at 56-485 to 56-488; 10A Wright & Miller, *supra*, § 2739, at 521-22 ("the party opposing the summary judgment motion does not have the right to withhold his evidence until trial; nor can he demand a trial because of the speculative possibility that a material issue of fact may appear at that time" (footnote omitted)).

Contrary to the Court of Appeals' suggestion, full development of the evidentiary support for claims prior to trial is one of the basic features of summary judgment motions and that which distinguishes it from a motion to dismiss on inadequate pleadings. 6 Moore's Federal Practice, *supra*, ¶ 56.09, at 56-165 to 56-168. Indeed, as Judge Clark, the primary author of the Federal Rules, has explained, one of the central purposes of summary judgment is to "serve[] as an instrument of discovery . . . to call forth quickly the disclosure on the merits of either claim or defense on pain or loss of the case for failure to do so." Clark, Code Pleading, *supra*, § 88, at 566. Where, as here, a party opposing a summary judgment motion has had an ample opportunity for discovery, this Court and others have required that the party must demonstrate a genuine issue of material fact at the summary judgment stage or its claim will fail. *See, e.g., Cities Service Co.*, 391 U.S. at 298-99; *Time, Inc. v. McLaney*, 406 F.2d 565, 571-73 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969).

The Court of Appeals' concern that holding a public figure to the constitutional burden of proof at the summary judgment stage would be at odds with "the relatively quick process [summary judgment] is supposed to be," 746 F.2d at 1570, is yet another instance of that court's misconception of the fundamental principles that underlie summary judgment. Summary judgment is designed to avoid the expense and delay of unnecessary trials. Rule 56 is not limited to "simple" cases; even where voluminous materials must

be evaluated, summary judgment is far quicker than a lengthy trial. As an experienced trial judge has recognized, the summary judgment process may be "particularly appropriate for complex litigation." Schwarzer, *supra*, 99 F.R.D. at 476.

This Court has approved the award of summary judgment, even in complex antitrust cases, containing voluminous records arising out of years of discovery. In *Cities Service Co.*, for example, this Court affirmed the grant of summary judgment in a complex antitrust action in which there had been years of extensive discovery.[14] Similarly, in *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert denied*, 455 U.S. 988 (1982), the court granted summary judgment after eight years of discovery in a complex class action brought by bank charge card holders on an allegation of conspiracy to fix the rate of interest charged for extended payment privileges on credit card purchases.

Additionally, to imply, as does the Court of Appeals, that a liberal discovery process is somehow wasteful, ignores the enormous waste of unnecessary trials that summary judgment was designed to prevent. That Rule 56 may give district courts some discretion to deny summary judgment in unusually complex cases, *see* Schwarzer, *supra*, 99 F.R.D. at 475 n.53, is hardly reason for reversing the award of summary judgment where the trial court has determined that the issues were not sufficiently complex to merit a trial.

In any event, the considerations of judicial efficiency that may come into play in evaluating the propriety of summary judgment in complex cases are wholly inapplicable in the present case. Petitioners' motion was supported by two affidavits and a thirty-one page appendix; respondents' opposition consisted of three short affidavits. Even if the few

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14. The petitioner and his associates were deposed for a total of 153 days over five and one-half years. 391 U.S. at 263.

hundred pages of deposition transcript are added to this record, it is hardly enough to impose a significant time burden on a busy trial or appellate judge.

The final policy ground cited by the Court of Appeals is equally fallacious. The court argued that, "courts of appeals would be burdened with the unusual task of making the largely factual determination of actual malice in many cases where a judge or jury verdict against the plaintiff would render that unnecessary." 746 F.2d at 1751. That a jury might ultimately find for the defendant and thus save an appellate court's time on appeal is no excuse for requiring the defendant to undergo an unnecessary trial. *See Jackson v. Virginia*, 443 U.S. 307, 318 n.10 (1979). If, under the *New York Times* standard, a reasonable jury could not enter a judgment for the plaintiff, the defendant is entitled to summary judgment.

E. This Court's Dictum In Footnote Nine of *Hutchinson v. Proxmire* Suggests No Special Rule Disfavoring Summary Judgment In Public-Figure Libel Cases.

As discussed above, where the substantive law requires a plaintiff to carry an extraordinary burden of proof at trial, a summary judgment determination must take this heightened burden into account. The Court of Appeals erroneously read this Court's dictum in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), to provide a basis for adopting a different rule in libel cases. In *Hutchinson*, this Court held that the plaintiff was not a "public figure," and it therefore had no occasion to rule on the propriety of summary judgment on the question of "actual malice." However, since the District Court had expressed the view that First Amendment concerns may make summary judgment the "rule" in libel cases, this Court felt "constrained to express some doubt about the so-called 'rule.'" *Id.* *Hutchinson's* dictum implies no more than that no "special procedural protections [apply] to defendants in libel and

defamation actions *in addition to the constitutional protections embodied in the substantive laws;*" and that "no special rules apply for summary judgment." *Calder v. Jones*, _____ U.S. _____, 104 S. Ct. 1482, 1488 (1984) (emphasis added).[15] *Hutchinson* therefore provides no basis whatsoever for the creation of a "special rule" relieving libel plaintiffs of the burden plaintiffs must carry in other summary judgment cases generally, where the law has imposed on them an extraordinary burden of proof at trial.

Before *Hutchinson*, some courts had assumed that *New York Times* required tilting the scales towards defendants in libel cases.[16] Other courts had explicitly adopted the same neutral standard suggested by *Hutchinson*: "*The standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury." *Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438, 441 (9th Cir.) (emphasis in original), *cert. denied*, 419 U.S. 872 (1974). Both before and after *Hutchinson*, most courts have routinely applied traditional summary judgment principles in libel cases, while giving due regard to the extraordinary burden that a public-figure libel plaintiff must carry under *New York Times*.[17] Under these principles, "[t]here

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15. It is well established that burden of proof is part of the "substantive laws" to which *Calder* adverts. *See* Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939); Central Vermont Ry. Co. v. White, 238 U.S. 507 (1915).

16. *E.g.*, Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.) (trial judge, in determining whether a plaintiff has demonstrated actual malice by clear and convincing evidence, should evaluate evidence in most reasonable light, and not in light most favorable to nonmoving party) (concurring opinion), *cert. denied*, 398 U.S. 940 (1970).

17. Courts applying these principles in the public-figure defamation context have widely held that plaintiffs must demonstrate genuine issues of material fact with "convincing clarity" or by "clear and convincing evidence" to avoid the entry of summary judgment. *See, e.g.*,

must be proof from which a reasonable jury acting reasonably *could* find actual malice by *clear and convincing evidence* before a plaintiff can survive summary judgment. If there are disputed facts which if resolved in the plaintiff's favor would not establish actual malice with convincing clarity, then they are not material and judgment will be granted for the defendant." *Nader v. de Toledano*, 408 A.2d 31, 49 (D.C. 1979) (emphasis in original; citations omitted), *cert. denied*, 444 U.S. 1078 (1980).

Application of a neutral summary judgment rule in libel cases neither compels nor forbids the award of summary judgment in appropriate cases. Many courts have denied summary judgment when plaintiffs have brought forward evidence of "actual malice" that a reasonable jury could find "clear and convincing." *See, e.g., Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981); *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1979); *Nader v. de Toledano*, 408 A.2d at 51-54. However, where a plaintiff fails to develop such evidence after ample opportunity for discovery, courts applying traditional summary judgment principles have concluded that there is no reason to put the defendant to the needless expense of preparing for trial. *See, e.g., Brown v. Herald Co.* 698 F.2d 949 (8th Cir. 1983); *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2nd Cir.), *cert. denied*, 449 U.S. 839

NOTES (*Continued*)

Brown v. Herald Co., 698 F.2d 949 (8th Cir. 1983); Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981); Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932 (2nd Cir.) *cert. denied*, 449 U.S. 839 (1980); Arnheiter v. Random House, Inc., 578 F.2d 804 (9th Cir. 1978), *cert. denied*, 444 U.S. 931 (1979); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872, (1974); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), *cert. denied*, 395 U.S. 922, (1969); Nader v. de Toledano, 408 A.2d 31 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

(1980); *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978), *cert. denied*, 444 U.S. 931 (1979); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

That the "actual malice" test may involve an appraisal of the defendant's state of mind does not mean that a plaintiff is entitled to get to the jury. Indeed in *Time, Inc. v. Pape*, 401 U.S. 279 (1971), this Court reinstated a directed verdict for the defendant on this issue. And, in many other settings, both this Court and other courts have affirmed the propriety of summary judgment in cases whose resolution turns on the defendant's state of mind. *See, e.g., First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) (summary judgment for defendant in antitrust conspiracy claim); *Otteson v. United States*, 622 F.2d 516 (10th Cir. 1980) (affirming grant of summary judgment to defendant as to existence of willful or malicious conduct under the Federal Tort Claims Act); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978) (antitrust conspiracy), *cert. denied*, 440 U.S. 982 (1979); *Walker v. American Motorists Ins. Co.*, 529 F.2d 1163 (5th Cir. 1976) (affirming grant of summary judgment to defendant as to insurance fraud); *Hahn v. Sargent*, 523 F.2d 461, 468 (1st Cir. 1975) (civil rights conspiracy), *cert. denied*, 425 U.S. 904 (1976). *See generally* 10A Wright & Miller, *supra*, § 2730, at 246-65.

As these courts recognize, "a party against whom summary judgment is sought is [not] entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce the *requisite quantum of evidence* to enable him to reach the jury with his claim." *Hahn v. Sargent*, 523 F.2d at 468 (emphasis added).

Nor is summary judgment inappropriate merely because determination of a party's mental state may involve questions of credibility. In each of the cases cited above, as in the present case, the party opposing summary judgment had the burden of establishing the defendant's state of mind. It "would make a mockery of the summary judgment

procedure" to allow a plaintiff to avoid summary judgment merely by attacking the credibility of the defendant's denials or by suggesting that the defendant's affidavit may be false. Sonenshein, "State of Mind and Credibility in the Summary Judgment Context: A Better Approach," 78 Nw. U.L. Rev. 774, 797 (1983); *see also Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1966 ("[d]iscredited testimony is not considered a sufficient basis for drawing a contrary conclusion").

As demonstrated in Part II, *infra*, respondents brought forth no evidence, much less any "clear and convincing" evidence, that would call into question Charles Bermant's sworn statement that he believed each of the challenged passages to be accurate at the time he wrote them. Nothing in *Hutchinson v. Proxmire* suggests that respondents are entitled to any more solicitude than the law generally accords to claimants who have failed to provide the requisite quantum of evidence to reach the jury.

F. The Dictum In Hutchinson v. Proxmire Requires Reexamination In Light Of Bose v. Consumers Union.

Moreover, to the extent that the *Hutchinson* dictum assumed that the issue of "actual malice" is a "factual" question, peculiarly appropriate for resolution by a jury, that assumption requires reexamination after *Bose v. Consumers Union*.

In *Bose*, this Court held that the "clearly erroneous" standard governing "findings of fact" under Rule 52(a) does not apply to determinations of "actual malice" in a case governed by *New York Times v. Sullivan*. *Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1967. The Court recognized that state-of-mind issues, such as those involving discriminatory intent, are ordinarily viewed as questions of "fact" to which Rule 52(a)'s "clearly erroneous standard" would apply. *See Pullman-Standard v. Swint*,

456 U.S. 273 (1982). But although the trial court had concluded in *Bose* that the challenged article had been published with knowledge of its falsity or with reckless disregard of its truth or falsity, this Court characterized the trial court's determination as a matter of "constitutional judgment" requiring independent judicial evaluation. The constitutional stakes involved in such judgments, the Court held, are simply "too great to entrust them finally to the judgment of the trier of fact." *Bose v. Consumers Union*, _____ U.S. at _____ n.17, 104 S. Ct. at 1960 n.17. Without deciding whether the trial court's conclusion was "clearly erroneous," this Court exercised its "independent judgment" to determine whether the plaintiff had established "actual malice with convincing clarity," as required by *New York Times*. *Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1967. Finding "as a matter of law" that the record did not contain clear and convincing evidence that the challenged article had been prepared with knowledge of falsity or reckless disregard of the truth, this Court upheld the reversal of the District Court's judgment for the plaintiffs.[18] *Id*.

The Court's refusal to treat a determination of "actual malice" as a finding of "fact" for purposes of Rule 52 carries over with equal force to the determination of whether "a

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18. In *Bose*, the Court took pains to underscore that it did not regard the trial court's conclusion as a "finding" of "fact." It upheld a reversal, even while accepting "all of the purely factual findings of the District Court . . . ." _____ U.S. at _____, 104 S. Ct. at 1967. It surrounded the word "finding" with quotation marks. *Id*. And it emphasized that the trial court's determination of actual malice, unlike its determination that the testimony of the article's author was incredible, was a "conclusion" rather than a "finding." And lest there be any doubt about its intentions, the Court adopted for purposes of "actual malice" cases Justice Harlan's conclusion in obscenity cases that "the question ... involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind." _____ U.S. at _____ n.25, 104 S. Ct. at 1963 n.25 (quoting Roth v. United States, 354 U.S. 476, 497-98 (1957)) (emphasis in original).

genuine issue of material fact" exists under Rule 56 to defeat a motion for summary judgment. Indeed, *Bose*'s holding that "actual malice" was not a "fact" relied on *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), in which the Court held that the jury could not decide the question of the relevance of an allegedly libelous statement to the plaintiff's public figure status.

In the summary judgment area, courts have long recognized that not every issue of ultimate "fact" must be submitted to the jury. This is particularly so when the decision turns not so much on factors within the common experience of the jury, but rather on questions of policy where "consistency, uniformity and predictability . . . are important to the administration of the underlying laws." Schwarzer, *supra*, 99 F.R.D. at 472. This principle is particularly applicable to the *New York Times* test of "actual malice," which is laden with fundamental policy concerns. As this Court recognized in *Bose*, it is "imperative" that the "constitutional values" inherent in the *New York Times* rule, which assumes its content only "through the evolutionary process of common law adjudication," be "protected" by judges at all levels who are sensitive to these important policies. *Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1960.[19]

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19. Acceptance of a significant role for judges in summary judgment libel cases does not mean that there is no role for juries on state-of-mind issues. In cases, unlike the present one, where there is a dispute about underlying "historical" facts, such as what information a publisher relied upon, what steps were taken to confirm information, and whether contrary information was brought to a publisher's attention, summary judgment would be inappropriate. These are questions whose resolution requires no special judicial competence and reflect no particular policy considerations. As *Bose* recognizes, however, juries have no special competence in determining what actions are sufficient to strip an author's work of constitutional protection.

II. No Reasonable Jury Could Find, Let Alone Find With "Convincing Clarity," That The Challenged Statements Were Published With Actual Malice.

Because the Court of Appeals applied an erroneous legal standard for determining whether respondents had met their burden of raising a jury issue, its judgment must be reversed and the District Court's judgment must be reinstated. No jury could conclude on the facts presented that respondents had adduced "clear and convincing evidence" that petitioners knew their statements were false or that they "subjectively entertained serious doubt about the truth" of these statements. *Bose v. Consumers Union*, _____ U.S. at _____, n.30, 104 S. Ct. at 1965 n.30. Respondents have failed to make the required showing. Regardless of the appropriate legal standard for this determination, *see supra* section I, the District Court properly granted summary judgment. Indeed, there is no evidence, let alone any "clear and convincing evidence," from which a reasonable jury could infer that petitioners knew their statements were false or "entertained serious doubt" about their truth.

A. Respondents Failed To Carry Their Burden Of Demonstrating Petitioners' "Actual Malice."

In support of their motion for summary judgment, petitioners relied primarily on the affidavit of Charles Bermant, the author of the challenged articles and the person upon whose judgment petitioners relied for the articles' accuracy.[20] Bermant's affidavit, and its attachment, set forth in detail the bases for Bermant's belief that each of the challenged passages was true. In response, respondents proffered three affidavits, two of which asserted that certain passages in the articles were untrue. (J.A. 100-101 [Carto

20. The Court of Appeals agreed that "Anderson was entitled to rely on Bermant's research, unless he had reason to doubt Bermant's accuracy. No such reason was presented by the record here." 746 F.2d at 1575.

Aff. ¶¶ 4, 5, 6,[21]; J.A. 108 [Jobe Aff.].) In the third affidavit, a former *Investigator* editor stated that he told one of the petitioners that a draft of the challenged articles was "ridiculous" and "terrible." (J.A. 94 [McGaw Aff. ¶ 13].) None of these showings was sufficient to create a factual dispute about petitioners' belief as to the truth of the articles.

Indeed, respondents made no showing whatsoever that could raise a factual issue as to petitioners' belief about the truth of a barrage of grave allegations going to the heart of respondents' operation. These allegations, all from reputable sources, include the following:

—Carto is the "ringleader" of "a nest of Nazis," a "known admirer of Adolf Hitler," and a "professional bigot" and "racist" who wants a "national socialist dictatorship in the United States." (J.A. 51, 55, 78 [Bermant Aff. Appx. 4, 8, 31].)

—Carto's ultimate objective is "domination by a pure 'Aryan' race of all North America and all Europe under the leadership of Willis Allison Carto." (J.A. 77 [Bermant Aff. Appx. 30].)

—Liberty Lobby is an "organization of the fascist right" whose newspaper "disseminates an array of racist, anti-Semitic literature propaganda . . . [but makes an] effort to camouflage the true bigotry of its pages. . . ." (J.A. 54, 55 [Bermany Aff. Appx. 7, 8].)

—Liberty Lobby's "Operation Survival" was a "plan to establish a right-wing military dictatorship." (J.A. 74 [Bermant Aff. Appx. 27-28].)

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21. Carto's affidavit also asserted that he had sued the publisher of one of the articles on which Bermant relied and had settled the case to his satisfaction. (J.A. 101 [Carto Aff. ¶¶ 8, 9].) As we discuss below, this showing is inadequate to raise a triable issue as to petitioners' reliance on this source. *See infra* pages 38-39.

—A $50,000 "reward" offered by an "Institute" Carto helped found was a "gimmick to gain publicity for the institute's causes." (J.A. 65 [Bermant Aff. Appx. 19].)

The Court of Appeals recognized that each of these allegations came from "reputable" sources. 746 F.2d at 1576-77. It therefore concluded that no reasonable person could doubt that Bermant believed the mosaic picture of respondents as Hitler-inspired racists and anti-Semites who were covertly dedicated to the destruction of our national freedoms and institutions. In the face of this finding, the court nevertheless reversed the award of summary judgment as to nine details in these articles that lent further color to this picture. Although Bermant drew each of these details from a variety of sources, the court concluded that these details had not been adequately corroborated, that a jury could reasonably conclude that the sources for these details were unreliable, and that Bermant's reliance on these sources was evidence of actual malice.

Even under the lessened burden the Court of Appeals thought proper in a summary judgment case, the court seriously misapplied the First Amendment principles embodied in *New York Times* and subsequent cases.

Under this Court's clear holdings, a failure to investigate the accuracy of the details printed in the articles, or to corroborate the sources from which those details were drawn, is not evidence of actual malice where, as here, nothing in the sources' character, or in the picture of respondents' activities they portrayed, contained any "obvious reasons to doubt" their reliability or accuracy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); *St. Amant v. Thompson*, 390 U.S. at 732-73; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967) (per curiam). To the contrary, the details of respondents' operation provided by Bermant's sources were entirely consistent with the overall depiction of respondents that emerged from the box full of materials which Mr. Bermant consulted. Under the

circumstances, there is no basis whatsoever to question Mr. Bermant's belief that the portrait he had drawn was "substantially correct." *New York Times v. Sullivan*, 376 U.S. at 286.[22]

B. No Reasonable Jury Could Find That Petitioners Seriously Doubted The Reliability Of The Information They Received About The Details Of Respondents' Activities.

Faced with the grave and sweeping nature of allegations from many reliable sources — allegations that went to the core of respondents' operation and pictured respondents as Hitler-inspired racists and anti-Semites — no reasonable jury could have doubted petitioners' belief as to the truth of nine details used in their articles to illustrate the larger picture.

1. Respondents' Obsession With Secrecy and Their Use of "Fronts"

For six examples of Carto's obsession with secrecy and use of interlocking "fronts" for his activities, Bermant drew upon an article written by Robert Eringer. The nature of Bermant's reliance on Eringer's information, as set forth in his affidavit and deposition testimony, is undisputed.

Eringer was a freelance writer who had published a book, written investigatory articles on the Ku Klux Klan

22. In analyzing the constitutional test of "actual malice," *New York Times* echoed the established tort law principle that "[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." Restatement (Second) of Torts, § 581A, comment (f) (1977). *See also* Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 641 (4th Cir. 1976) (embellishment to add "color or interest" to article is without legal significance). If a jury that finds the "sting" of an allegation to be true cannot impose liability for mere inaccurate details, surely a reporter who lawfully accepts the picture of his subject as a Hitler-inspired racist and would-be dictator cannot be considered to have doubted reports that further illustrate that picture.

and other subjects, and had completed an article about Liberty Lobby that had been partially published in *Mother Jones* magazine. (J.A. 261-62 [Bermant Dep. Tr. 71-72].) Bermant asked to see Eringer's written work, and upon reviewing it found Eringer to be an experienced reporter, who had interviewed many people and had done a great deal of research on his Liberty Lobby story. (J.A. 263 [Bermant Dep. Tr. 73].) Bermant also found that many of the key facts about Liberty Lobby appearing in Eringer's article were corroborated by sources Bermant had independently consulted, including articles in the *National Review* and the *Washington Post*. (*Id.*).

That the District Court had only Bermant's "word" for these facts, 746 F.2d at 1578, is no ground for ignoring his account absent any evidence that would call into question the truth of Bermant's sworn statements. And although respondents deposed Bermant, there is nothing in his deposition testimony that raises any question about the truthfulness of his account of his dealings with Eringer. *See generally* 6 Moore's Federal Practice, *supra*, ¶ 56.15[4].

Even though respondents controverted none of these facts, the Court of Appeals nonetheless concluded that a jury "could" find that Bermant's reliance on Eringer's material demonstrated a degree of recklessness sufficient to establish actual malice. 746 F.2d at 1578. The court reached its conclusion primarily because Mr. Bermant did not ask Eringer to disclose his sources of information and never "looked [him] in the eye . . . ." *Id.* at 1579. Neither of these factors is sufficient to raise a triable issue as to Bermant's reliance on Eringer's material, much less to constitute "clear and convincing evidence" of Bermant's disregard for the material's truth or falsity.

In the first place, the Court of Appeals mischaracterized the nature of Bermant's reliance on Eringer's information. Eringer was not an "anonymous" informant, reliance on whom this Court suggested in *St. Amant v. Thompson*, 390 U.S. at 732, could give rise to an inference of actual malice. Eringer was a professional journalist who

was reporting on the basis of what appeared to be his own substantial research. An experienced journalist himself, Bermant regarded Eringer as "obviously a professional reporter" and "quite an impressive source." (J.A. 286 [Bermant Dep. Tr. 116].) Eringer was paid $250 for his story, further confirming that he was not viewed as a mere "informant." It is undisputed that Anderson has never paid money to an informant, but would only pay money to a "professional newsman, who was doing a professional job." (J.A. 199 [Anderson Dep. Tr. 76].)

In light of these uncontroverted facts, it is insignificant that Bermant did not meet Eringer until after *The Investigator* articles were published. Bermant regarded Eringer as a professional reporter, and upon reviewing his writings, saw the work of a thorough and impressive journalist. He had no need to "look[]. . . Eringer in the eye."

The descriptions in Eringer's article upon which Bermant relied were far from being "so inherently improbable that only a reckless man would have put them in circulation." *St. Amant v. Thompson*, 390 U.S. at 732. Compared with what Bermant already knew about Carto's and Liberty Lobby's operations from many other sources whose reliability stands unchallenged, *see supra* pages 28 through 29, the supposedly "scurrilous" allegations derived from Eringer's article are tame. *Cf. Curtis Publishing Co. v. Butts*, 388 U.S. 130, 138 (1967) (noting the "devastating nature of the article's assertions"). These allegations could "not have seemed unreasonable to one familiar with . . . prior publicized statements on the underlying controversy." *Associated Press v. Walker*, 388 U.S. 130, 159 (1967).

The Court of Appeals found defamatory and unreliable Eringer's report, reprinted by Bermant, that Carto secretly observed employees through a one-way mirror. 746 F.2d at 1578 (*see* J.A. 17 [Complaint, Count One,

¶ 14(XXIII)].)[23] This allegation could scarcely be regarded as "improbable" or "scurrilous" in light of the indisputably reliable information provided to Bermant by a ranking Liberty Lobby official that respondents illegally used lie detector and voice stress tests on current and prospective employees as a means of ensuring "loyalty and operational security." (J.A. 72-74 [Bermant Aff. Appx. 25-26]); *see* 746 F.2d at 1577.[24] Indeed, the essence of both allegations is the same: that respondents were so concerned about internal security that they adopted intrusive measures to guard against disloyalty.

The same observations apply to the allegation that Carto "conducts his business by way of conference calls from a public telephone." (J.A. 15 [Complaint, Count One, ¶ 14(XIII)].)[25] This allegation cannot be regarded as "inherently improbable" respecting Carto, who was said by another reliable source to be secretly planning to establish a dictatorship. 746 F.2d at 1577. This is especially so in light

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23. This description was accompanied by an illustration of Carto, which was separately challenged. (J.A. 16 [Complaint, Count One, ¶ 14 (XIX)].)

24. The use of such tests is unlawful in the District of Columbia, where Liberty Lobby is headquartered, and is punishable by a fine, imprisonment, or both. D.C. Code §§ 36-801 to 803 (Michie 1981). Respondents have conceded that they engaged in such unlawful activities. Plaintiffs' Answers to First Set of Interrogatories by Defendants, ¶ 15(d).

25. The Court of Appeals' conclusion that a jury would regard this statement as implying criminal conduct by Carto is baseless. It is hard to imagine how a statement that Carto conducts business from public telephones "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). At most it would seem to portray Carto as either security conscious and fearful of eavesdropping, or reclusive. Neither portrayal rises to the level required by the Restatement, and the latter portrayal of Carto as reclusive was specifically held by the Court of Appeals to be nondefamatory. 746 F.2d at 1572 (allegation 4).

of the repeated descriptions of Carto by the *National Review* and the *Washington Post* as "reclusive," and the incessant concern for "operational security" revealed by the Chairman of Liberty Lobby's own Board of Policy. (*See* J.A. 72-73 [Bermant Aff. Appx. 25-26].)

Nor could any reasonable jury regard as implausible the allegation that a Carto front organization supported G. Gordon Liddy's 1968 Congressional Campaign. (J.A. 15 [Complaint, Count One, ¶ 14(XIV)].)[26] This allegation is fully consistent with information that Bermant acquired from numerous sources that Carto uses a variety of "front" organizations to advance his political goals, and indeed used the very front organization identified by Eringer for other political purposes. (*See, e.g.*, J.A. 34, 59 [Bermant Aff. Appx. 7, 13].) Liberty Lobby's involvement in partisan political activity was also known to Bermant through Liberty Lobby's own report that it had been found to have violated federal election laws. (J.A. 83 [Bermant Aff. Appx. 36].)

The allegation in Eringer's article, on which Bermant relied, that a story in a Liberty Lobby house organ, *The Spotlight*, was a "total hoax," (J.A. 18 [Complaint, Count One, ¶ 14 (XXVII)]), is likewise fully consistent with what Bermant learned from other sources, both individuals and published articles: that Carto had previously participated in other hoaxes. (*See* J.A. 64-72 [Bermant Aff. Appx. 18-25]; J.A. 342 [Drosdik Dep. Tr. 7-8].) Indeed, Bermant had the word of Carto insiders on at least two such hoaxes. The *Los Angeles Times* reported that the director of the Institute for Historical Review, who acknowledged the "close connection" between the Institute and Carto, "admitted

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26. The Court of Appeals apparently thought that since Liddy engaged in criminal conduct during the 1972 Presidential campaign, the organization's association with him might therefore appear to carry a defamatory implication. 746 F.2d at 1578. However, the alleged association between the two groups occurred four full years prior to Liddy's criminal activity. Thus, nothing about the organization's alleged support of Liddy's 1968 campaign would seem to harm Carto's reputation.

. . . that the reward [offered by the Institute to anyone who could prove that the Holocaust had occurred] was a gimmick." (J.A. 64-67 [Bermant Aff. Appx. 18-21].) The hoax allegation was also consistent with Eringer's report that Carto had staged a trumped-up "protest" against Yugoslavia's Marshal Tito, using one of his employees to masquerade as a "Croatian exile." This allegation, which respondents never challenged, was later confirmed by the testimony of a former Carto employee. (J.A. 342 [Drosdik Dep. Tr. 7-8].)

The final allegation for which Eringer was a source involves the statement that Carto "owned" the Government Education Foundation (GEF) to which Liberty Lobby paid $6,000 rent per month. (J.A. 14-15 [Complaint, Count One, ¶ 14(XI)].) Eringer's information supporting this allegation was substantially corroborated in the *Washington Post* and the *National Review*, which reported that GEF is "Liberty Lobby's landlord" and the "sole owner . . . of Liberty Lobby's building," and that "Carto signed as Chairman of GEF when GEF purchased the Liberty Lobby building." (J.A. 57-58 [Bermant Aff. Appx. 11-12].) To the extent that Eringer's statements went beyond what was reported in those two articles, respondents have pointed to nothing that would likely have led Bermant to doubt the truth of Eringer's statements. Even if Eringer's information were not corroborated in all respects, this lack of corroboration would not be evidence of "actual malice." *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 332; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. at 83-85. To the contrary, as this Court recognized in *St. Amant v. Thompson*, 390 U.S. at 733, partial verification of a story is evidence supporting the *absence* of "actual malice."

Two additional concerns raised by the Court of Appeals deserve only brief mention. Although the court stated that "Anderson admits that he did not care whether Eringer was reliable," 746 F.2d at 1579, this statement distorts

Anderson's testimony[27] and improperly relies on his supposed "admission." Anderson did not write the challenged articles and did not check their facts. He relied on the accuracy of his reporters and on his reporters' efforts to satisfy themselves that the information they had received was reliable. (J.A. 212-13 [Anderson Dep. Tr. 101].) What *Anderson* did or did not believe about Eringer's reliability is therefore irrelevant to what *Bermant* believed; and although respondents deposed both Anderson and Bermant, there is nothing in the record to indicate that Anderson and Bermant ever discussed Eringer or Bermant's reliance on Eringer as a source of information for the articles.

The Court of Appeals also improperly questioned Eringer's reliability because it believed that Eringer, unlike Bermant's other sources, could not have been deposed. In the first place, the court had no basis for this belief. That Eringer was living abroad would not have prevented respondents from taking his deposition pursuant to Rule 28(b)[28], and while respondents did not take his deposition, they never claimed that Eringer could not be found. Second, even if Eringer were in fact unavailable as a deposition witness in 1982, that would have no bearing on whether Bermant had any reason to doubt Eringer's reliability in 1981.[29]

Finally, the Court of Appeals' assumption that Eringer was unavailable for depositions is surely no excuse for holding a trial. The purpose of summary judgment is to assess

27. Anderson never testified that he didn't care whether Eringer was reliable. His testimony was that his own belief about Eringer's reliability "wouldn't have mattered," since he was relying on *Bermant's* work and not that of Eringer or any other individual source. (J.A. 185, 194 [Anderson Dep. Tr. 51, 67].)

28. Rule 28(b) permits depositions to be taken in a foreign country by notice, commission, or a letter rogatory.

29. The Court of Appeals' distinction between Eringer—whom the court said was unavailable to be deposed—and Bermant's other sources—who, being present in this country, could have been deposed—rings particularly hollow in light of the fact that respondents never bothered to depose the latter sources.

the proof to determine "whether there is a genuine need for trial." Advisory Committee's Note to Rule 56, 31 F.R.D. at 648. If Eringer could not be deposed, why should he be expected to be available as a trial witness? The unsupported hope that a witness might turn up is utterly inadequate to demonstrate a "need for trial." *See* 6 Moore's Federal Practice, *supra*, § 56.15[4], at 56-424 to 56-425.

2. Carto's Affinity With Hitler

The Court of Appeals also held that a trial was required to resolve two allegations relating to Carto's affinity with Adolf Hitler. The first of these was an illustration depicting Carto in a manner respondents claim looks like Hitler. (J.A. 16 [Complaint, Count One, ¶ 14(XIX)].) The second was a passage in the challenged article describing a gathering at which Carto was said to have joined in the singing of the infamous "Horst Wessel Lied," and to have delivered a speech in which he emulated Hitler's style. (J.A. 19 [Complaint, Count One, ¶ 14(XXIX)].)

Even if the illustration could reasonably be viewed as making Carto look like Hitler, which it cannot, the illustration cannot be said to have been published with actual malice in light of the ample information petitioners had from a multitude of sources, sources whose reliability respondents have not challenged, that Carto admired Hitler (J.A. 51, 78, 88-89 [Bermant Aff. Appx. 4, 31 and 41][30]) and that Carto's "dream was to succeed the Fuehrer as savior of the 'Aryan race'. . . ." (J.A. 77 [Bermant Aff. Appx. 30].) Given that respondents did not prevail on the allegation that Carto greatly admired Hitler and sought to succeed him, they can scarcely prevail merely because the illustration might bring home the link between Carto and Hitler more vividly to the reader. *See supra* notes 22, 30.

With regard to the written description of Carto's singing a song and making a speech, the Court of Appeals held

30. The Court of Appeals upheld summary judgment on the allegation that Carto was a "Hitler fan." 746 F.2d at 1576.

that petitioners were on notice of the description's probable falsity because the description was taken from an article co-authored by Joseph Spear, an *Investigator* editor, and previously published in *True* magazine, which had been the subject of a libel suit that was "settled to Carto's satisfaction." 746 F.2d at 1578. The Court of Appeals was wrong both factually and legally.

Although the specific descriptions of Carto singing the "Horst Wessel Lied" and emulating Hitler were derived from the *True* article, petitioners had ample information from other reliable sources, including both the *Congressional Record* and the *National Review*, that Carto had been the guest of honor at a gathering at which the guests sang the "Horst Wessel Lied," and that Carto had thereafter delivered an anti-Semitic speech. (J.A. 84 [Bermant Aff. Appx. 36-37].) In light of Carto's well-documented admiration for Hitler, no reasonable jury could doubt that, to Bermant, the articles' description of Carto's behavior rang true.

That the *True* article had itself been the subject of a libel suit could not have put petitioners on notice of the unreliability of that article's description of Carto's activities at the "Horst Wessel" party. In the first place, there is no evidence that petitioners were aware of the *True* litigation or settlement.[31] Second, there is no evidence that the *True* litigation revolved around the descriptions of Carto's behavior that have been challenged in the present litigation.

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31. Although Joseph Spear, one of the *True* article's authors, was later employed by *The Investigator*, Spear was never served with a copy of the complaint in the *True* litigation, never entered an appearance and did not sign the settlement agreement or the stipulation of dismissal. For the convenience of the Court, the Petition for Removal and the Stipulation and Order of Dismissal have been lodged with the Office of the Clerk of the Supreme Court.

No reasonable inference can be drawn that Spear had notice of the *True* litigation. Notably, although respondents had a year of discovery in which to inquire as to Spear's knowledge, they chose not to do so.

Respondents did not challenge every passage in *The Investigator* articles, and there is no reason to conclude that they had challenged the particular passages in the eight-page *True* article on which Bermant drew.[32] That an article has been challenged in some respects scarcely calls into question every passage in the article. This is especially so where, as here, the *True* report was substantially corroborated by other reliable sources.[33]

3. Carto's Plans for Sending American Blacks "Back to Africa"

The Court of Appeals also held that a jury question existed concerning whether the articles' allegation that Carto's "repatriation" scheme envisioned the "forced deportation" of blacks to Africa was made with actual malice. 746 F.2d at 1578. The court recognized that Bermant's sources support the allegations that (1) Carto created the

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32. Although Carto's affidavit refers to a "compensatory" article that *True* published as part of the settlement, (J.A. 101 [Carto Aff. ¶ 8]), this "article" is simply an interview with two Liberty Lobby employees and in no sense can be regarded as a retraction of anything in the prior article. (*See* J.A. 103-107.)

33. In any event, even were Spear a party to the settlement, his participation in the *True* settlement would be irrelevant to the present proceedings. Rule 408 of the Federal Rules of Evidence provides that evidence of a compromise or settlement "is not admissible to prove liability for or invalidity of the claim or its amount." The Advisory Committee's Note following Rule 408 provides two underlying principles for the rule: (1) that the evidence is irrelevant, since a settlement offer "may be motivated by a desire for peace rather than from any concession of weakness of position," *see Sternberger v. United States*, 401 F.2d 1012, 1018 (Ct. Cl. 1968); and (2) that there exists a strong "public policy favoring the compromise and settlement of disputes," *see Perzinsky v. Chevron Chemical Co.*, 503 F.2d 654, 658 (7th Cir. 1974). *See generally* 23 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5302 (1980 and Supp. 1985). Given these substantial policy concerns, an inference that the *True* settlement gave Spear reason to doubt the truth of the *True* article simply may not be drawn.

Joint Council for Repatriation, and (2) the Council's purpose was to "send[] American blacks back to Africa." *Id.* However, because one of Bermant's sources referred to the scheme as one for "voluntary repatriation," the court thought that a triable question remained whether Bermant's characterization of the scheme as envisioning "forced deportation" was made with actual malice.

Contrary to the conclusion of the Court of Appeals, Bermant had no reason to doubt that his characterization of Carto's scheme as envisioning "forced" deportation was accurate. Bermant relied, *inter alia*, on a declaration filed in another lawsuit by California lawyer William Cox, a former police officer and Justice Department official, which stated that the "Joint Council for Repatriation" was "for the *deportation* of American Blacks to Africa."[34] (*See* J.A. 313 [Cox Dep. Tr. 20] (emphasis added)).

That one source characterized Carto's "repatriation" scheme as "voluntary" does not mean that Bermant was required to reject Cox's characterization, especially in light of credible information from many other sources that Carto covertly sought to establish a dictatorship, "secretly promoted" the Joint Council, and feared grave harm to his operations if news of the Joint Council's connection with Liberty Lobby were revealed. (J.A. 61-62 [Bermant Aff. App. 15].) In light of what he had learned about respondents' other activities, including their use of front organizations to disguise their true purposes, *see supra* pages 30-37, Bermant's characterization of Carto's scheme as one for forced deportation was surely a "possible rational interpretation[]" giving a jury no leeway to draw a conclusion that he wrote with actual malice. *Time, Inc. v. Pape*, 401 U.S. at 290; *see also Bose v. Consumers Union*, ____ U.S. at ____, 104 S. Ct. at 1966.

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34. The Court of Appeals correctly recognized that Cox's role as an attorney representing a party in litigation with respondents does not render him unreliable. 746 F.2d at 1576 n.13.

CONCLUSION

The Court of Appeals wrongly concluded that the standards for evaluating whether a public-figure libel case could reach the jury on the issue of "actual malice" are different from the standards that must be applied in evaluating a motion for a directed verdict. The constitutional standard of "clear and convincing evidence" must be applied before trial on a motion for summary judgment, at trial on a motion for a directed verdict, after trial on a motion for judgment n.o.v., and on appeal.

Because respondents failed to adduce *any* evidence, let alone any "clear and convincing evidence," that petitioners' articles were published with "actual malice," the District Court correctly entered summary judgment for petitioners.

For the reasons described above, we respectfully request that the order of the Cc rt of Appeals be reversed.

July 18, 1985

Respectfully submitted,

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No. 84-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

— v. —

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

On Writ of Certiorari to the Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Can the constitutional requirement that evidence of actual malice in a public-figure libel case be "clear and convincing" be disregarded for purposes of a defendant's motion for summary judgment?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. The Investigator Publishing Company is a Texas corporation. It does not have any subsidiaries or affiliates.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 746 F.2d 1563 (D.C. Cir. 1984). The opinion of the District Court is reported at 562 F. Supp. 201 (D.D.C. 1983).

JURISDICTION

Jurisdiction of this Court to review the judgment of the Court of Appeals is by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1) (1982). Petitioners' petition for a writ of *certiorari* was granted by this Court on June 3, 1985.

STATUTORY PROVISION INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> *Motion and Proceedings Thereon*. The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Civ. P. 56(c).

STATEMENT OF THE CASE

Petitioner Jack Anderson is a well-known reporter and publisher. In 1981, he served as publisher of a now defunct magazine called *The Investigator*, owned by petitioner Investigator Publishing Company. Petitioner Adkins was President and Chief Executive Officer of the Company.

Respondent Liberty Lobby, Inc. is a self-styled political action organization, whose stated aims are to "advocate[] and promote[] patriotism, nationalism, lawfulness [and] protection of the national interests of the United States and the economic interests of its citizens. . . ." (J.A. 12 [Complaint, Count One, ¶12].) Respondent Willis A. Carto is Liberty Lobby's founder and Treasurer. Since its inception in 1955, Liberty Lobby has been engaged in political lobbying and the dissemination of its views on what have been delicately described as "highly controversial subjects."[1]

Carto and Liberty Lobby disseminate their views through their own extensive media network. In 1981, this network included *The Spotlight*, a national newspaper with 345,000 subscribers; "This is Liberty Lobby," a daily radio commentary broadcast on 460 radio stations; and a weekly television program broadcast on 30 stations. Liberty Lobby also sells, publishes or distributes a multitude of publications, including "Debunking the Genocide Myth"; "The Hoax of the Twentieth Century"; "The White Paper on the ADL"; and *Imperium*, a book written by Francis Parker Yockey, for which Carto wrote a lengthy introduction.

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1. Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1968). In that case, the present respondents unsuccessfully sought to enjoin Anderson and the late Drew Pearson, from publishing a newspaper column based on certain Liberty Lobby documents. Liberty Lobby's chairman had previously sued Anderson and Pearson for libel, claiming that an article charging him with anti-Semitism had defamed him. The court awarded summary judgment to Anderson and Pearson on the ground that the column was substantially true. Dall v. Pearson, 246 F. Supp. 812 (D.D.C. 1963).

The October 1981 issue of the *The Investigator* included articles titled "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles described Liberty Lobby and Carto as fascist, neo-Nazi, anti-Semitic and racist. Respondents filed a diversity action in the United States District Court for the District of Columbia, claiming that thirty passages in the articles had defamed them. The complaint sought $2 million in general damages and $22 million in punitive damages.[2]

In the year and a quarter granted for discovery,[3] respondents deposed, among other persons, Anderson and Charles Bermant, the author of the articles.[4] Prior to Bermant's deposition, respondents were provided an affidavit by Bermant, describing the steps he had taken in researching and writing the articles, together with a 43-page appendix setting forth in detail the sources on which he had relied for each of the thirty allegedly defamatory statements. Respondents were also provided access to a box of written materials that Bermant had gathered during his research. (J.A. 44-45 [Bermant Aff. ¶ 11].)

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2. The complaint originally named two additional defendants, who were subsequently dismissed under Rule 41(a). In addition to the defamation claim, the complaint also charged Anderson alone with unlawful conversion of certain Liberty Lobby files. The District Court granted Anderson summary judgment on this claim, holding that the claim was barred by the statute of limitations. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 210 (D.D.C. 1983). Respondents did not appeal.

3. The District Court initially ordered that discovery be completed by September 30, 1982, but later extended the discovery cut-off to October 15, 1982.

4. The articles were also accompanied by an introduction, captioned "Did *Mein Kampf* Spawn Yockey's *Imperium*, A Book Revived by Carto's Liberty Lobby?" This introduction, signed "The Editors," was written by Anderson based on materials supplied by Bermant. (J.A. 232 [Bermant Dep. Tr. 17].)

Bermant's affidavit and attachment and the depositions collectively establish the following facts, none of which respondents subsequently controverted by affidavits or otherwise:

After receiving a journalism degree and working as a newspaper reporter for several years, Charles Bermant began editorial duties for *The Investigator* in March 1981. (J.A. 43-44 [Bermant Aff. ¶¶ 2,4,5-7].)[5] In April, Liberty Lobby and Carto attracted widespread attention when it was revealed that Warren Richardson, a nominee for Assistant Secretary of Health and Human Services, had previously served as Liberty Lobby's general counsel.[6] In May 1981, Bermant was assigned to work on articles on Carto and Yockey.

Bermant spent over a month working on the articles. His first step was to file requests with several government agencies under the Freedom of Information Act, 5 U.S.C. § 552, from which he ultimately received more than a thousand pages of documents and newspaper clippings. (J.A. 44 [Bermant Aff. ¶¶ 9,10].) He collected additional published materials about Liberty Lobby, Carto and Yockey from Anderson's office files, newspaper files and libraries, including the Library of Congress. (*Id.*) These materials included articles that had previously been published in the *National Review*, the *Washington Post*, the *Washington Star*, the *Los Angeles Times*, and *True* magazine, as well as statements in the *Congressional Record*. Bermant also read Carto's introduction to *Imperium*, and much of the book as well. (J.A. 44-45 [Bermant Aff. ¶11].)

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5. In addition to writing, these duties included answering telephone inquiries from writers who had story ideas, and requesting the writers to send him written materials for his evaluation and possible use. (J.A. 261 [Bermant Dep. Tr. 71].)

6. Although Mr. Richardson subsequently condemned as "morally repugnant" what he termed Liberty Lobby's "anti-Jewish, racist actions," his nomination was ultimately withdrawn. "Health Post Choice Withdraws Amid Controversy," N.Y. Times, Apr. 26, 1981, at A21, col. 1; "Liberty Lobby's Ex-Lawyer Ends HHS Quest," Washington Post, Apr. 25, 1981 at A1.

After reviewing this written material, Bermant contacted personnel at the Anti-Defamation League and the Federal Election Commission and also undertook numerous personal and telephone interviews. (J.A. 44 [Bermant Aff. ¶ 10].) Bermant also spoke with a freelance author named Robert Eringer, who told him that he had recently completed a story about Liberty Lobby. (J.A. 261 [Bermant Dep. Tr. 70-71].) At Bermant's request, Eringer mailed a draft of the article, together with a book he had published and investigatory articles he had written on other subjects. (J.A. 262 [Bermant Dep. Tr. 71].) Bermant checked Eringer's article against other published sources and used portions of this material in his article, for which Eringer was paid $250.[7] Answers of Defendant The Investigator Publishing Co. to First Set of Plaintiffs' Interrogatories at 3, 6, 7.

Bermant also interviewed and received court documents from William Cox, an attorney who was representing a plaintiff in litigation against an alleged Carto "front" organization.

Bermant tried several times to secure an interview with Carto, but his repeated telephone calls went unanswered. (J.A. 45 [Bermant Aff. ¶ 13].) He was, however, allowed to conduct a lengthy interview with the chairman of Liberty Lobby's Policy Board. (*Id.*)

Bermant's affidavit stated that he continued to believe that the challenged articles were true and accurate, just as he had at the time he wrote them. (J.A. 46 [Bermant Aff. ¶ 20].) Anderson testified that he had relied on Bermant for the accuracy of these articles. (J.A. 212-13 [Anderson Dep. Tr. 101].)

Petitioners then moved for summary judgment on the ground that respondents were public figures and could not show with the "convincing clarity" required by *New York*

7. It was Anderson's policy to pay for information only if the recipient was "a professional newsman, who was doing a professional job." (J.A. 199 [Anderson Dep. Tr. 76].)

Times Co. v. Sullivan, 376 U.S. 254 (1964), and subsequent cases, that the challenged articles had been published with knowledge that they were false or that petitioners "in fact entertained serious doubts" as to their truth. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Petitioners also argued that respondents were "libel proof" because Liberty Lobby's reputation had already been irreparably tarnished by twenty years of articles and other public comments repeatedly accusing them of anti-Semitic and racist views and activities.

Respondents filed three affidavits in opposition to the motion, after having been granted an extension of time in which to undertake further discovery.

The District Court ruled that "[t]he material underlying facts necessary for disposition of this motion . . . are uncontested," 562 F. Supp. at 205, and granted petitioners' motion for summary judgment on the entire complaint.[8] After examining Bermant's affidavit and the accompanying 43-page appendix, the District Court found that "as a matter of law the information contained within these sources substantiates each allegation contained in the articles." 562 F. Supp. at 209. The court held that the respondents' three affidavits had done no more than controvert the truth or even-handedness of some of the allegations made by the sources on which Bermant had relied. Such a showing, the District Court held, was insufficient to create a factual issue of malice, especially in light of petitioners' "finely etched effort presenting in careful detail the journalistic research underlying each statement." *Id.* The District Court found further support for its conclusion in "the reality that plaintiffs manage to attack only a small proportion of the sources that defendants relied upon." *Id.*

The Court of Appeals reversed the District Court's judgment as to nine of the thirty allegations of defamation.

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8. As noted above at note 2, the District Court held that respondents' conversion claim against Anderson was time-barred, a holding from which respondents did not appeal.

Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984). Although respondents no longer questioned their status as public figures, and must, therefore, under *New York Times* and *St. Amant* carry the burden *at trial* of establishing with "convincing clarity" that the alleged defamatory statements about them had been published with "actual knowlege" of their falsity or with "serious doubt" about their truth, the Court of Appeals held that a lesser showing was sufficient to avoid a summary judgment. Similarly, while the Court of Appeals recognized that, under *Bose Corp. v. Consumers Union of United States, Inc.*, ____ U.S. ____, 104 S. Ct. 1949 (1984), courts must "independently decide" at the trial stage whether the *New York Times-St. Amant* showing had been made, it held that such an "independent judicial determination" was "incompatible with the preliminary nature of the summary judgment inquiry." 746 F.2d at 1571.

While rejecting the "convincing clarity" standard and the "independent judicial determination" requirement at the summary judgment stage, the Court of Appeals nevertheless held, on the basis of the affidavits and other materials submitted by the parties, that no reasonable jury could find actionable twenty-one of the articles' allegations. These included, among others, that Carto is "anti-Semitic," "hides in the shadows of reclusion and anonymity," and is a "Hitler fan"; that a $50,000 "reward" offered to anyone who could prove the existence of the Holocaust was a "gimmick"; that Liberty Lobby was a "nest of Nazis"; and that Liberty Lobby had violated federal election laws.[9]

With respect to the remaining allegations, the Court of Appeals held respondents were not "libel proof" and that under its reduced standard for determining what issues to send to trial "a jury could reasonably conclude" that the

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9. These allegations were variously held to be nondefamatory, 746 F.2d at 1572; constitutionally protected opinion, *id.*; or based upon "reputable sources" whose reliability petitioners had no reason to doubt, *id.* at 1576. Respondents have not challenged the propriety of summary judgment as to any of these allegations.

articles were published with actual knowledge of their falsity or with disregard for their truth or falsity. 746 F.2d at 1577-78. The appellate court therefore reversed the grant of summary judgment and remanded to the District Court for trial on these allegations. *Id.* at 1579. After a petition for rehearing with a suggestion for rehearing *en banc* was denied, petitioners sought a writ of *certiorari*, which was granted by this Court on June 3, 1985.[10]

SUMMARY OF ARGUMENT

The First Amendment mandates that a public-figure libel plaintiff may not prevail at trial unless he or she demonstrates with "convincing clarity" that the allegedly defamatory statement was made with "actual malice." This heightened burden of proof is necessary to ensure the robust discussion of public issues crucial to our democracy.

By ignoring this mandate at the summary judgment stage, the Court of Appeals created a special rule disadvantaging libel defendants on summary judgment. This rule is as unsupported by precedent as it is by logic. In all areas of the law, civil and criminal, it is firmly established that a plaintiff's ultimate burden of proof must be taken into account in determining whether his or her claim should be submitted to a jury. This is true in the libel area as well. The standard for granting summary judgment under Rule 56(c), that "there is no genuine issue as to any material fact," as well as that Rule's purpose "to pierce the allegations" of "notice" pleadings, is identical to that for directed verdict and therefore requires that a court's determination of whether there is a genuine need for trial incorporate the heightened burden of proof imposed on public-figure plaintiffs.

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10. Although the petition sought review on the "libel-proof" issue as well, *certiorari* was limited to the issue of whether the constitutional requirement that evidence of actual malice in a public-figure libel case be "clear and convincing" can be disregarded for purposes of a defendant's motion for summary judgment.

In adopting its special rule for libel cases, the Court of Appeals disregarded the fundamental principles underlying summary judgment. Summary judgment is designed to assess the proof that the parties could muster at trial. It is grounded in the policies of the Federal Rules of Civil Procedure that contemplate liberal discovery. Consequently, there is no basis for making summary judgment the truncated process the Court of Appeals thought it should be in libel cases. The Court of Appeals' approach would lead to needless and wasteful trials in cases in which it is clear that a party could not ultimately prevail.

In evaluating summary judgment motions in actual malice cases, other courts have consistently incorporated a public-figure plaintiff's heightened burden of proof, while still continuing to afford nonmoving parties the traditional protections due on summary judgment. Application of this neutral summary judgment rule implies no special protections for libel defendants beyond the constitutional protections embodied in the substantive laws, and it neither compels nor forbids the award of summary judgment in appropriate cases. As this Court and other federal courts have recognized in a variety of settings, summary judgment is not inappropriate merely because the state of mind or credibility of witnesses is alleged to be at issue. And, in any event, this Court's recognition of the special need for independent judicial scrutiny of issues of constitutional fact should apply with equal force to summary judgment determinations in public-figure libel cases.

The District Court's award of summary judgment to petitioners was correct because respondents failed to adduce any evidence, let alone "clear and convincing evidence," that petitioners' articles were published with "actual malice." The Court of Appeals found that a barrage of grave allegations going to the heart of respondents' operation came from reputable sources, and could lead no reasonable jury to doubt petitioners' belief that the picture of respondents as Hitler-inspired racists and anti-Semites was accurate. In light of these findings, no reasonable jury

could doubt petitioners' lack of "actual malice" in publishing the remaining allegations, which merely provided details of the larger picture.

Even if examined without reference to the substantially similar allegations on which summary judgment was upheld, nothing about the content of, or the sources for, the remaining allegations provided any "obvious reason to doubt" their reliability. Petitioners' sources for the information afforded no basis for doubting the reliability of those sources, especially in light of their corroboration by numerous other highly reputable sources. Moreover, the information itself was far from being "so inherently improbable that only a reckless man would have put [it] in circulation." Thus, there was no basis for the Court of Appeals' conclusion that a reasonable jury "could" find evidence of actual malice even on the improperly reduced standard the court applied.

ARGUMENT

I. Summary Judgment Must Be Awarded To A Defendant Unless A Public-Figure Plaintiff Has Adduced Evidence From Which A Reasonable Jury Could Find, With Convincing Clarity, That The Defendant Acted With Actual Malice.

A. The First Amendment Requires A Public-Figure Libel Plaintiff To Demonstrate With Clear and Convincing Evidence That A Defamatory Statement Was Made With Knowledge That It Was False Or With Reckless Disregard For Its Truth Or Falsity.

Twenty-one years ago, this Court held that common law principles governing defamation were inadequate to assure that the freedoms of speech and press have the " 'breathing space' that they 'need to survive'." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). In order to "insure the ascertainment and publication of the truth

about public affairs," this Court concluded that erroneous publications, as well as truthful ones, must be granted First Amendment protection. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). The Court held that "neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies." *Id.*

These policies, this Court held, require that a public figure may recover for an allegedly defamatory statement only upon a showing that the statement was made with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times v. Sullivan*, 376 U.S. at 279-80. And, as a further safeguard, the Court required that this showing be made with "the convincing clarity which the constitutional standard demands." *Id.* at 285-86. *See also Herbert v. Lando*, 441 U.S. 153, 170 (1979); *Bose Corp. v. Consumers Union of United States, Inc.*, _____ U.S. _____, 104 S. Ct. 1949, 1965 (1984).

When the consequences of an erroneous verdict may destroy precious freedoms, this Court has refused to tolerate the risk of error inherent in the ordinary "preponderance of the evidence" standard. Instead, the Court has ruled that the risk of an erroneous decision must be further limited by imposing on the plaintiff the extraordinary burden of establishing its case by "clear and convincing" evidence. *See, e.g., Addington v. Texas*, 441 U.S. 418, 424 (1979) (civil commitment); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation).

In First Amendment cases, the "convincing clarity" standard is based on the recognition that "the freedom to speak one's mind is not only an aspect of individual liberty -- and thus a good unto itself -- but also is essential to the common quest for truth and the vitality of society as a whole." *Bose v. Consumers Union*, _____ U.S. at _____, 104 S.Ct. at 1961. The constitutional requirement that libel judgments on behalf of public figures must be supported by

"clear and convincing" evidence is based on the same considerations of public welfare that underlie the requirement that public figures establish "actual malice": any lesser showing "dampens the vigor and limits the variety of public debate." *New York Times v. Sullivan*, 376 U.S. at 279. When public debate is involved, the damage to society from an erroneous verdict for the plaintiff is far greater than in ordinary tort litigation, where an erroneous verdict in favor of one party is considered no more serious than an erroneous verdict in favor of the other. Only last year, in *Bose v. Consumers Union*, this Court again reaffirmed the "convincing clarity" requirement as one of the fundamental safeguards of "the precious liberties established and ordained by the Constitution." ____ U.S. at ____, 104 S. Ct. at 1965.

B. A Plaintiff's Heightened Burden Of Proof Must Be Considered In Determining A Motion For Directed Verdict.

The Court of Appeals recognized that unless a public figure adduces "clear and convincing evidence" of actual malice, a jury may not consider the case, and a directed verdict must be entered for the defendant. 746 F.2d at 1571. This recognition was unquestionably correct, for it is well settled that the creation of an extraordinary burden of proof carries with it the "concomitant duty . . . to consider the applicable burden when deciding whether to send a case to the jury." *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972) (Friendly, C.J.).

This principle has been routinely applied in civil cases, where courts have evaluated a motion under Rule 50 for a directed verdict or for judgment n.o.v. in light of the "clear and convincing evidence" burden that must be met at trial. *See, e.g., United States Fire Ins. Co. v. Royal Ins. Co.* 759 F.2d 306, 312 (3d Cir. 1985) (fraud; directed verdict for defendant); *Roginsky v. Richardson-Merrell, Inc.*, 378

F.2d 832, 850-51 (2d Cir. 1967) (punitive damages; directed verdict for defendant).

The same principle is the "prevailing criterion" in criminal cases, where courts must evaluate a motion for judgment of acquittal in light of the prosecution's burden of proving at trial guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 n.11 (1979).[11]

Thus, even where the special protections afforded by the First Amendment are not relevant, the decision whether to refer a case to a jury must draw its content from the ultimate standard of proof at trial.

C. The Standard For Summary Judgment Under Rule 56 Is Identical To That For Directed Verdict And Therefore Incorporates A Public-Figure Plaintiff's Heightened Burden Of Proof.

Despite its recognition of the rule that courts must consider the applicable burden of proof in deciding whether to send a case to the jury, the Court of Appeals held, without citing any supporting authority,[12] that district courts must ignore the plaintiff's burden of proof at the summary judgment stage. This holding is as devoid of logic as it is unsupported by authority.

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11. United States v. Davis, 562 F.2d 681, 683-84 (D.C. Cir. 1977), cited by the Court of Appeals (746 F.2d at 1571) merely reaffirms this well-established principle. It provides no support for distinguishing between the standards for summary judgment and directed verdict in *civil* cases. That " 'probable cause' is sufficient to take the case to trial" in a *criminal* case (746 F.2d at 1571, citing Brown v. Department of Justice, 715 F.2d 662, 667 (D.C. Cir. 1983)) is beside the point. The criminal law provides no procedure equivalent to civil law's summary judgment for pre-trial challenges to the adequacy of the prosecution's case. *See* Costello v. United States, 350 U.S. 359 (1956).

12. As noted above at note 11, the authorities cited by the Court of Appeals either are irrelevant to summary judgment or reaffirm the rule governing directed verdict. To the extent that the Court of Appeals relied on Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970), this reliance is simply bewildering. *See infra* note 16.

As the Advisory Committee on Civil Rules of Practice and Procedure of the Judicial Conference of the United States emphasized with respect to Rule 56, "[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof *in order to see whether there is a genuine need for trial*." 31 F.R.D. 621, 648 (1962) (emphasis added).

The language of Rule 56 provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This standard for granting summary judgment must be applied in light of a party's ultimate burden of proof at trial. Under Rule 56, a factual dispute is only "genuine" and "material" when the nonmoving party provides "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968).

It has therefore been widely recognized, both by this Court and by respected commentators (including the principal author of the Federal Rules), that the standards applicable to motions for summary judgment and motions for a directed verdict under Rule 50 are the same. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944); C. Clark, Code Pleading § 88, at 566 (2d ed. 1947); Louis, "Federal Summary Judgment Doctrine: A Critical Analysis," 83 Yale L.J. 745 (1974); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.02[10], at 56-43 to 56-44, ¶ 56.04[2], at 56-74 to 56-75, ¶ 56.15[3], at 56-479 to 56-480 (2d ed. 1985) [hereinafter cited as Moore's Federal Practice]; 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2712, at 569-71 (2d ed. 1983) [hereinafter cited as Wright & Miller]; *see generally*, Schwarzer, "Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact," 99 F.R.D.

465, 482 (1984) ("[i]n effect the opposing party must rebut the moving party's showing with evidence which would preclude a directed verdict or judgment n.o.v. for the moving party" (footnote omitted)) [hereinafter cited as Schwarzer].

As these authorities recognize, both motions look to the existence of questions of material fact to be resolved by the jury and seek to remove from the fact finder those cases in which there is no legitimate controversy under applicable law. *See, e.g., United States v. General Motors Corp.*, 518 F.2d 420, 442 (D.C. Cir. 1975) (where "the established facts and relevant presumptions would have entitled [the moving party] to a directed verdict at trial, he is entitled to a summary judgment under Rule 56"). The purpose of both the summary judgment and directed verdict procedures -- to weed out unnecessary trials -- would be subverted by permitting a jury to resolve issues that could not alter a court's ultimate disposition of a case on the law.

In determining whether a trial is "necessary," for the purposes of Rule 56, courts have imposed significant limitations to assure that parties are not denied a reasonable opportunity to present their case at trial. They have therefore placed upon the moving party the burden of demonstrating that there are no genuine issues of material fact and have required that all disputed facts and inferences must be construed "in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). But the formidable burden that movants must meet is no different from the burden imposed on a party who seeks a directed verdict. *See* 5A Moore's Federal Practice, *supra*, ¶ 50.02[1], at 50-26.

To be sure, entry of summary judgment deprives the nonmoving party of his "day in court," but neither the interests of the litigants nor those of the judicial system are well served by "exposing the litigants to unnecessary delay, work and expense in going to trial when the trial judge

would be bound to direct a verdict in movant's favor after all evidence is adduced." *Chambers v. United States*, 357 F.2d 224, 227 (8th Cir. 1966).

That directed verdicts are entered after the plaintiff has had an opportunity to complete discovery and marshal his or her evidence in a trial is likewise no reason for tolerating a lesser showing by the plaintiff at the summary judgment stage than at trial. Rule 56(f) gives a party opposing summary judgment ample opportunity to complete discovery and marshal the evidence so that he or she can present sufficient facts to justify a trial.[13]

In the present case, respondents were granted an extension of time in which to conclude discovery before opposing petitioners' motion; they sought no additional evidence to oppose the motion. There is no reason to allow respondents to go forward with a case that could not be submitted to the jury. To do so would be to encourage an exercise in futility, wasteful not only to the litigants, but to the courts and to other litigants whose claims must be deferred while the empty ritual of a hopeless trial is played out. Justice Frankfurter's remarks on the same subject are particularly appropriate:

> The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge.

Wilkerson v. McCarthy, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring).

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13. Fed. R. Civ. P. 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

D. The Court Of Appeals Misconceived The Nature And Purpose Of Summary Judgment.

The rationale advanced by the Court of Appeals to support its unprecedented restructuring of the summary judgment rule does not comport with the purpose of Rule 56 or modern practice under that rule.

The Court of Appeals stated: "Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well." 746 F.2d at 1570. That such a consequence should be of concern lays bare the Court of Appeals' misunderstanding of the purpose of summary judgment. An evaluation of the weight of the defendant's uncontroverted facts is precisely the inquiry mandated by Rule 56(c) to determine, under the language of that rule, if "the moving party is entitled to a judgment as a matter of law" when no disputed material facts are found to exist. *See* 10 Wright & Miller, *supra*, § 2712, at 571-73. Moreover, summary judgment is not properly "a search for a minimum of *facts* supporting the plaintiff's case," but rather is a search for those *contested* facts which, if found to be as alleged by a nonmoving party, would permit a jury to find for that party at trial.

The Court of Appeals' concern that recognition of a heightened burden of proof on summary judgment would "force the plaintiff to try his entire case" prematurely "in pretrial affidavits and depositions," 746 F.2d at 1570, is similarly ill founded. Rule 56(e) was amended in 1963 to require that, "[w]hen a motion for summary judgment is made . . ., an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or . . . otherwise . . ., must set forth specific facts showing that there is a genuine issue for trial." It is black letter law, based upon this provision, that a party opposing a summary judgment motion may not sit back and

withhold proof of his or her claims until trial; nor may that party defeat a motion on the basis of materials that are "conjectural" or "speculative" as to what the proof at trial may demonstrate. 6 Moore's Federal Practice, *supra*, ¶ 56.15[3], at 56-485 to 56-488; 10A Wright & Miller, *supra*, § 2739, at 521-22 ("the party opposing the summary judgment motion does not have the right to withhold his evidence until trial; nor can he demand a trial because of the speculative possibility that a material issue of fact may appear at that time" (footnote omitted)).

Contrary to the Court of Appeals' suggestion, full development of the evidentiary support for claims prior to trial is one of the basic features of a summary judgment motion and that which distinguishes it from a motion to dismiss on inadequate pleadings. 6 Moore's Federal Practice, *supra*, ¶ 56.09, at 56-165 to 56-168. Indeed, as Judge Clark, the primary author of the Federal Rules, has explained, one of the central purposes of summary judgment is to "serve[] as an instrument of discovery . . . to call forth quickly the disclosure on the merits of either claim or defense on pain or loss of the case for failure to do so." Clark, Code Pleading, *supra*, § 88, at 566. Where, as here, a party opposing a summary judgment motion has had an ample opportunity for discovery, this Court and others have required that the party must demonstrate a genuine issue of material fact at the summary judgment stage or its claim will fail. *See, e.g., Cities Service Co.*, 391 U.S. at 298-99; *Time, Inc. v. McLaney*, 406 F.2d 565, 571-73 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969).

The Court of Appeals' concern that holding a public figure to the constitutional burden of proof at the summary judgment stage would be at odds with "the relatively quick process [summary judgment] is supposed to be," 746 F.2d at 1570, is yet another instance of that court's misconception of the fundamental principles that underlie summary judgment. Summary judgment is designed to avoid the expense and delay of unnecessary trials. Rule 56 is not limited to "simple" cases; even where voluminous materials must

be evaluated, summary judgment is far quicker than a lengthy trial. As an experienced trial judge has recognized, the summary judgment process may be "particularly appropriate for complex litigation." Schwarzer, *supra*, 99 F.R.D. at 476.

This Court has approved the award of summary judgment, even in complex antitrust cases containing voluminous records arising out of years of discovery. In *Cities Service Co.*, for example, this Court affirmed the grant of summary judgment in a complex antitrust action in which there had been years of extensive discovery.[14] Similarly, in *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982), the court granted summary judgment after eight years of discovery in a complex class action brought by bank charge card holders on an allegation of conspiracy to fix the rate of interest charged for extended payment privileges on credit card purchases.

Additionally, to imply, as does the Court of Appeals, that a liberal discovery process is somehow wasteful, ignores the enormous waste of unnecessary trials that summary judgment was designed to prevent. That Rule 56 may give district courts some discretion to deny summary judgment in unusually complex cases, *see* Schwarzer, *supra*, 99 F.R.D. at 475 n.53, is hardly reason for reversing the award of summary judgment where the trial court has determined that the issues were not sufficiently complex to merit a trial.

In any event, the considerations of judicial efficiency that may come into play in evaluating the propriety of summary judgment in complex cases are wholly inapplicable in the present case. Petitioners' motion was supported by two affidavits and a forty-three page appendix; respondents' opposition consisted of three short affidavits. Even if the few

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14. The petitioner and his associates were deposed for a total of 153 days over five and one-half years. 391 U.S. at 263.

hundred pages of deposition transcript are added to this record, it is hardly enough to impose a significant time burden on a busy trial or appellate judge.

The final policy ground cited by the Court of Appeals is equally fallacious. The court argued that, "courts of appeals would be burdened with the unusual task of making the largely factual determination of actual malice in many cases where a judge or jury verdict against the plaintiff would render that unnecessary." 746 F.2d at 1731. That a jury might ultimately find for the defendant and thus save an appellate court's time on appeal is no excuse for requiring the defendant to undergo an unnecessary trial. *See Jackson v. Virginia*, 443 U.S. 307, 318 n.10 (1979). If, under the *New York Times* standard, a reasonable jury could not enter a judgment for the plaintiff, the defendant is entitled to summary judgment.

E. This Court's Dictum In Footnote Nine Of *Hutchinson v. Proxmire* Suggests No Special Rule Disfavoring Summary Judgment In Public-Figure Libel Cases.

As discussed above, where the substantive law requires a plaintiff to carry an extraordinary burden of proof at trial, a summary judgment determination must take this heightened burden into account. The Court of Appeals erroneously read this Court's dictum in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), to provide a basis for adopting a different rule in libel cases. In *Hutchinson*, this Court held that the plaintiff was not a "public figure," and it therefore had no occasion to rule on the propriety of summary judgment on the question of "actual malice." However, since the District Court had expressed the view that First Amendment concerns may make summary judgment the "rule" in libel cases, this Court felt "constrained to express some doubt about the so-called 'rule.'" *Id.* *Hutchinson's* dictum implies no more than that no "special procedural protections [apply] to defendants in libel and

defamation actions *in addition to the constitutional protections embodied in the substantive laws;*" and that "no special rules apply for summary judgment." *Calder v. Jones*, _____ U.S. _____, 104 S. Ct. 1482, 1488 (1984) (emphasis added).[15] *Hutchinson* therefore provides no basis whatsoever for the creation of a "special rule" relieving libel plaintiffs of the burden plaintiffs must carry in other summary judgment cases generally, where the law has imposed on them an extraordinary burden of proof at trial.

Before *Hutchinson*, some courts had assumed that *New York Times* required tilting the scales towards defendants in libel cases.[16] Other courts had explicitly adopted the same neutral standard suggested by *Hutchinson*: "*The standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury." *Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438, 441 (9th Cir.) (emphasis in original), *cert. denied*, 419 U.S. 872 (1974). Both before and after *Hutchinson*, most courts have routinely applied traditional summary judgment principles in libel cases, while giving due regard to the extraordinary burden that a public-figure libel plaintiff must carry under *New York Times*.[17] Under these principles, "[t]here

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15. It is well established that burden of proof is part of the "substantive laws" to which *Calder* adverts. *See* Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939); Central Vermont Ry. Co. v. White, 238 U.S. 507 (1915).

16. *E.g.*, Wasserman v. Time, Inc., 424 F.2d 920, 922 (D.C. Cir.) (trial judge, in determining whether a plaintiff has demonstrated actual malice by clear and convincing evidence, should evaluate evidence in most reasonable light, and not in light most favorable to nonmoving party) (concurring opinion), *cert. denied*, 398 U.S. 940 (1970).

17. Courts applying these principles in the public-figure defamation context have widely held that plaintiffs must demonstrate genuine issues of material fact with "convincing clarity" or by "clear and convincing evidence" to avoid the entry of summary judgment. *See, e.g.*,

must be proof from which a reasonable jury acting reasonably *could* find actual malice by *clear and convincing evidence* before a plaintiff can survive summary judgment. If there are disputed facts which if resolved in the plaintiff's favor would not establish actual malice with convincing clarity, then they are not material and judgment will be granted for the defendant." *Nader v. de Toledano*, 408 A.2d 31, 49 (D.C. 1979) (emphasis in original; citations omitted), *cert. denied*, 444 U.S. 1078 (1980).

Application of a neutral summary judgment rule in libel cases neither compels nor forbids the award of summary judgment in appropriate cases. Many courts have denied summary judgment when plaintiffs have brought forward evidence of "actual malice" that a reasonable jury could find "clear and convincing." *See, e.g., Rebozo v. Washington Post Co.*, 637 F.2d 375, 382 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981); *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1979); *Nader v. de Toledano*, 408 A.2d at 51-54. However, where a plaintiff fails to develop such evidence after ample opportunity for discovery, courts applying traditional summary judgment principles have concluded that there is no reason to put the defendant to the needless expense of preparing for trial. *See, e.g., Brown v. Herald Co.*, 698 F.2d 949 (8th Cir. 1983); *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839

NOTES *(Continued)*

Brown v. Herald Co., 698 F.2d 949 (8th Cir. 1983); Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981); Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932 (2nd Cir.), *cert. denied*, 449 U.S. 839 (1980); Arnheiter v. Random House, Inc., 578 F.2d 804 (9th Cir. 1978), *cert. denied*, 444 U.S. 931 (1979); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Guam Federation of Teachers, Local 1581 v. Ysrael, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872, (1974); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), *cert. denied*, 395 U.S. 922, (1969); Nader v. de Toledano, 408 A.2d 31 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

(1980); *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978), *cert. denied*, 444 U.S. 931 (1979); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

That the "actual malice" test may involve an appraisal of the defendant's state of mind does not mean that a plaintiff is entitled to get to the jury. Indeed in *Time, Inc. v. Pape*, 401 U.S. 279 (1971), this Court reinstated a directed verdict for the defendant on this issue. And, in many other settings, both this Court and other courts have affirmed the propriety of summary judgment in cases whose resolution turns on the defendant's state of mind. *See, e.g., First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) (summary judgment for defendant in antitrust conspiracy claim); *Otteson v. United States*, 622 F.2d 516 (10th Cir. 1980) (affirming grant of summary judgment to defendant as to existence of willful or malicious conduct under the Federal Tort Claims Act); *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978) (antitrust conspiracy), *cert. denied*, 440 U.S. 982 (1979); *Walker v. American Motorists Ins. Co.*, 529 F.2d 1163 (5th Cir. 1976) (affirming grant of summary judgment to defendant as to insurance fraud); *Hahn v. Sargent*, 523 F.2d 461, 468 (1st Cir. 1975) (civil rights conspiracy), *cert. denied*, 425 U.S. 904 (1976). *See generally* 10A Wright & Miller, *supra*, § 2730, at 246-65.

As these courts recognize, "a party against whom summary judgment is sought is [not] entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce the *requisite quantum of evidence* to enable him to reach the jury with his claim." *Hahn v. Sargent*, 523 F.2d at 468 (emphasis added).

Nor is summary judgment inappropriate merely because determination of a party's mental state may involve questions of credibility. In each of the cases cited above, as in the present case, the party opposing summary judgment had the burden of establishing the defendant's state of mind. It "would make a mockery of the summary judgment

procedure" to allow a plaintiff to avoid summary judgment merely by attacking the credibility of the defendant's denials or by suggesting that the defendant's affidavit may be false. Sonenshein, "State of Mind and Credibility in the Summary Judgment Context: A Better Approach," 78 Nw. U.L. Rev. 774, 797 (1983); *see also Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1966 ("[d]iscredited testimony is not considered a sufficient basis for drawing a contrary conclusion").

As demonstrated in Part II, *infra*, respondents brought forth no evidence, much less any "clear and convincing" evidence, that would call into question Charles Bermant's sworn statement that he believed each of the challenged passages to be accurate at the time he wrote them. Nothing in *Hutchinson v. Proxmire* suggests that respondents are entitled to any more solicitude than the law generally accords to claimants who have failed to provide the requisite quantum of evidence to reach the jury.

F. The Dictum In *Hutchinson v. Proxmire* Requires Reexamination In Light Of *Bose v. Consumers Union*.

Moreover, to the extent that the *Hutchinson* dictum assumed that the issue of "actual malice" is a "factual" question, peculiarly appropriate for resolution by a jury, that assumption requires reexamination after *Bose v. Consumers Union*.

In *Bose*, this Court held that the "clearly erroneous" standard governing "findings of fact" under Rule 52(a) does not apply to determinations of "actual malice" in a case governed by *New York Times v. Sullivan*. *Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1967. The Court recognized that state-of-mind issues, such as those involving discriminatory intent, are ordinarily viewed as questions of "fact" to which Rule 52(a)'s "clearly erroneous standard" would apply. *See Pullman-Standard v. Swint*,

456 U.S. 273 (1982). But although the trial court had concluded in *Bose* that the challenged article had been published with knowledge of its falsity or with reckless disregard of its truth or falsity, this Court characterized the trial court's determination as a matter of "constitutional judgment" requiring independent judicial evaluation. The constitutional stakes involved in such judgments, the Court held, are simply "too great to entrust them finally to the judgment of the trier of fact." *Bose v. Consumers Union*, _____ U.S. at _____ n.17, 104 S. Ct. at 1960 n.17. Without deciding whether the trial court's conclusion was "clearly erroneous," this Court exercised its "independent judgment" to determine whether the plaintiff had established "actual malice with convincing clarity," as required by *New York Times*. *Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1967. Finding "as a matter of law" that the record did not contain clear and convincing evidence that the challenged article had been prepared with knowledge of falsity or reckless disregard of the truth, this Court upheld the reversal of the District Court's judgment for the plaintiff.[18] *Id*.

The Court's refusal to treat a determination of "actual malice" as a finding of "fact" for purposes of Rule 52 carries over with equal force to the determination of whether "a

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18. In *Bose*, the Court took pains to underscore that it did not regard the trial court's conclusion as a "finding" of "fact." It upheld a reversal, even while accepting "all of the purely factual findings of the District Court . . . ." _____ U.S. at _____, 104 S. Ct. at 1967. It surrounded the word "finding" with quotation marks. *Id*. And it emphasized that the trial court's determination of actual malice, unlike its determination that the testimony of the article's author was incredible, was a "conclusion" rather than a "finding." And lest there be any doubt about its intentions, the Court adopted for purposes of "actual malice" cases Justice Harlan's conclusion in obscenity cases that "the question ... involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind." _____ U.S. at _____ n.25, 104 S. Ct. at 1963 n.25 (quoting Roth v. United States, 354 U.S. 476, 497-98 (1957)) (emphasis in original).

genuine issue of material fact" exists under Rule 56 to defeat a motion for summary judgment. Indeed, *Bose*'s holding that "actual malice" was not a "fact" relied on *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), in which the Court held that the jury could not decide the question of the relevance of an allegedly libelous statement to the plaintiff's public figure status.

In the summary judgment area, courts have long recognized that not every issue of ultimate "fact" must be submitted to the jury. This is particularly so when the decision turns not so much on factors within the common experience of the jury, but rather on questions of policy where "consistency, uniformity and predictability . . . are important to the administration of the underlying laws." Schwarzer, *supra*, 99 F.R.D. at 472. This principle is particularly applicable to the *New York Times* test of "actual malice," which is laden with fundamental policy concerns. As this Court recognized in *Bose*, it is "imperative" that the "constitutional values" inherent in the *New York Times* rule, which assumes its content only "through the evolutionary process of common law adjudication," be "protected" by judges at all levels who are sensitive to these important policies. *Bose v. Consumers Union*, _____ U.S. at _____, 104 S. Ct. at 1960.[19]

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19. Acceptance of a significant role for judges in summary judgment libel cases does not mean that there is no role for juries on state-of-mind issues. In cases, unlike the present one, where there is a dispute about underlying "historical" facts, such as what information a publisher relied upon, what steps were taken to confirm information, and whether contrary information was brought to a publisher's attention, summary judgment would be inappropriate. These are questions whose resolution require no special judicial competence and reflect no particular policy considerations. As *Bose* recognizes, however, juries have no special competence in determining what actions are sufficient to strip an author's work of constitutional protection.

II. No Reasonable Jury Could Find, Let Alone Find With "Convincing Clarity," That The Challenged Statements Were Published With Actual Malice.

Because the Court of Appeals applied an erroneous legal standard for determining whether respondents had met their burden of raising a jury issue, its judgment must be reversed and the District Court's judgment must be reinstated. No jury could conclude on the facts presented that respondents had adduced "clear and convincing evidence" that petitioners knew their statements were false or that they "subjectively entertained serious doubt about the truth" of these statements. *Bose v. Consumers Union*, _____ U.S. at _____ n.30, 104 S. Ct. at 1965 n.30. Respondents have failed to make the required showing. Regardless of the appropriate legal standard for this determination, *see supra* section I, the District Court properly granted summary judgment. Indeed, there is no evidence, let alone any "clear and convincing evidence," from which a reasonable jury could infer that petitioners knew their statements were false or "entertained serious doubt" about their truth.

A. Respondents Failed To Carry Their Burden Of Demonstrating Petitioners' "Actual Malice."

In support of their motion for summary judgment, petitioners relied primarily on the affidavit of Charles Bermant, the author of the challenged articles and the person upon whose judgment petitioners relied for the articles' accuracy.[20] Bermant's affidavit, and its attachment, set forth in detail the bases for Bermant's belief that each of the challenged passages was true. In response, respondents proffered three affidavits, two of which asserted that certain passages in the articles were untrue. (J.A. 100-101 [Carto

20. The Court of Appeals agreed that "Anderson was entitled to rely on Bermant's research, unless he had reason to doubt Bermant's accuracy. No such reason was presented by the record here." 746 F.2d at 1575.

Aff. ¶¶ 4, 5, 6,[21]; J.A. 108 [Jobe Aff.].) In the third affidavit, a former *Investigator* editor stated that he told one of the petitioners that a draft of the challenged articles was "ridiculous" and "terrible." (J.A. 94 [McGaw Aff. ¶ 13].) None of these showings was sufficient to create a factual dispute about petitioners' belief as to the truth of the articles.

Indeed, respondents made no showing whatsoever that could raise a factual issue as to petitioners' belief about the truth of a barrage of grave allegations going to the heart of respondents' operation. These allegations, all from reputable sources, include the following:

—Carto is the "ringleader" of "a nest of Nazis," a "known admirer of Adolf Hitler," and a "professional bigot" and "racist" who wants a "national socialist dictatorship in the United States." (J.A. 51, 55, 78 [Bermant Aff. Appx. 4, 8, 31].)

—Carto's ultimate objective is "domination by a pure 'Aryan' race of all North America and all Europe under the leadership of Willis Allison Carto." (J.A. 77 [Bermant Aff. Appx. 30].)

—Liberty Lobby is an "organization of the fascist right" whose newspaper "disseminates an array of racist, anti-Semitic literature propaganda . . . [but makes an] effort to camouflage the true bigotry of its pages. . . ." (J.A. 54, 55 [Bermant Aff. Appx. 7, 8].)

—Liberty Lobby's "Operation Survival" was a "plan to establish a right-wing military dictatorship." (J.A. 74 [Bermant Aff. Appx. 27-28].)

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21. Carto's affidavit also asserted that he had sued the publisher of one of the articles on which Bermant relied and had settled the case to his satisfaction. (J.A. 101 [Carto Aff. ¶¶ 8, 9].) As we discuss below, this showing is inadequate to raise a triable issue as to petitioners' reliance on this source. *See infra* pages 38-39.

—A $50,000 "reward" offered by an "Institute" Carto helped found was a "gimmick to gain publicity for the institute's causes." (J.A. 65 [Bermant Aff. Appx. 19].)

The Court of Appeals recognized that each of these allegations came from "reputable" sources. 746 F.2d at 1576-77. It therefore concluded that no reasonable person could doubt that Bermant believed the mosaic picture of respondents as Hitler-inspired racists and anti-Semites who were covertly dedicated to the destruction of our national freedoms and institutions. In the face of this finding, the court nevertheless reversed the award of summary judgment as to nine details in these articles that lent further color to this picture. Although Bermant drew each of these details from a variety of sources, the court concluded that these details had not been adequately corroborated, that a jury could reasonably conclude that the sources for these details were unreliable, and that Bermant's reliance on these sources was evidence of actual malice.

Even under the lessened burden the Court of Appeals thought proper in a summary judgment case, the court seriously misapplied the First Amendment principles embodied in *New York Times* and subsequent cases.

Under this Court's clear holdings, a failure to investigate the accuracy of the details printed in the articles, or to corroborate the sources from which those details were drawn, is not evidence of actual malice where, as here, nothing in the sources' character, or in the picture of respondents' activities they portrayed, contained any "obvious reasons to doubt" their reliability or accuracy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); *St. Amant v. Thompson*, 390 U.S. at 732-73; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967) (per curiam). To the contrary, the details of respondents' operation provided by Bermant's sources were entirely consistent with the overall depiction of respondents that emerged from the box full of materials which Mr. Bermant consulted. Under the

circumstances, there is no basis whatsoever to question Mr. Bermant's belief that the portrait he had drawn was "substantially correct." *New York Times v. Sullivan*, 376 U.S. at 286.[22]

B. No Reasonable Jury Could Find That Petitioners Seriously Doubted The Reliability Of The Information They Received About The Details Of Respondents' Activities.

Faced with the grave and sweeping nature of allegations from many reliable sources — allegations that went to the core of respondents' operation and pictured respondents as Hitler-inspired racists and anti-Semites — no reasonable jury could have doubted petitioners' belief as to the truth of nine details used in their articles to illustrate the larger picture.

1. Respondents' Obsession With Secrecy and Their Use of "Fronts"

For six examples of Carto's obsession with secrecy and use of interlocking "fronts" for his activities, Bermant drew upon an article written by Robert Eringer. The nature of Bermant's reliance on Eringer's information, as set forth in his affidavit and deposition testimony, is undisputed.

Eringer was a freelance writer who had published a book, written investigatory articles on the Ku Klux Klan

22. In analyzing the constitutional test of "actual malice," *New York Times* echoed the established tort law principle that "[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." Restatement (Second) of Torts, § 581A, comment (f) (1977). *See also* Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 641 (4th Cir. 1976) (embellishment to add "color or interest" to article is without legal significance). If a jury that finds the "sting" of an allegation to be true cannot impose liability for mere inaccurate details, surely a reporter who lawfully accepts the picture of his subject as a Hitler-inspired racist and would-be dictator cannot be considered to have doubted reports that further illustrate that picture.

and other subjects, and had completed an article about Liberty Lobby that had been partially published in *Mother Jones* magazine. (J.A. 261-62 [Bermant Dep. Tr. 71-72].) Bermant asked to see Eringer's written work, and upon reviewing it found Eringer to be an experienced reporter, who had interviewed many people and had done a great deal of research on his Liberty Lobby story. (J.A. 263 [Bermant Dep. Tr. 73].) Bermant also found that many of the key facts about Liberty Lobby appearing in Eringer's article were corroborated by sources Bermant had independently consulted, including articles in the *National Review* and the *Washington Post*. (*Id.*).

That the District Court had only Bermant's "word" for these facts, 746 F.2d at 1378, is no ground for ignoring his account absent any evidence that would call into question the truth of Bermant's sworn statements. And although respondents deposed Bermant, there is nothing in his deposition testimony that raises any question about the truthfulness of his account of his dealings with Eringer. *See generally* 6 Moore's Federal Practice, *supra*, ¶ 56.15[4].

Even though respondents controverted none of these facts, the Court of Appeals nonetheless concluded that a jury "could" find that Bermant's reliance on Eringer's material demonstrated a degree of recklessness sufficient to establish actual malice. 746 F.2d at 1378. The court reached its conclusion primarily because Mr. Bermant did not ask Eringer to disclose his sources of information and never "looked [him] in the eye . . . ." *Id.* at 1379. Neither of these factors is sufficient to raise a triable issue as to Bermant's reliance on Eringer's material, much less to constitute "clear and convincing evidence" of Bermant's disregard for the material's truth or falsity.

In the first place, the Court of Appeals mischaracterized the nature of Bermant's reliance on Eringer's information. Eringer was not an "anonymous" informant, reliance on whom this Court suggested in *St. Amant v. Thompson*, 390 U.S. at 732, could give rise to an inference of actual malice. Eringer was a professional journalist who

was reporting on the basis of what appeared to be his own substantial research. An experienced journalist himself, Bermant regarded Eringer as "obviously a professional reporter" and "quite an impressive source." (J.A. 286 [Bermant Dep. Tr. 116].) Eringer was paid $250 for his story, further confirming that he was not viewed as a mere "informant." It is undisputed that Anderson has never paid money to an informant, but would only pay money to a "professional newsman, who was doing a professional job." (J.A. 199 [Anderson Dep. Tr. 76].)

In light of these uncontroverted facts, it is insignificant that Bermant did not meet Eringer until after *The Investigator* articles were published. Bermant regarded Eringer as a professional reporter, and upon reviewing his writings, saw the work of a thorough and impressive journalist. He had no need to "look[]. . . Eringer in the eye."

The descriptions in Eringer's article upon which Bermant relied were far from being "so inherently improbable that only a reckless man would have put them in circulation." *St. Amant* v. *Thompson*, 390 U.S. at 732. Compared with what Bermant already knew about Carto's and Liberty Lobby's operations from many other sources whose reliability stands unchallenged, *see supra* pages 28 through 29, the supposedly "scurrilous" allegations derived from Eringer's article are tame. *Cf. Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 138 (1967) (noting the "devastating nature of the article's assertions"). These allegations could "not have seemed unreasonable to one familiar with . . . prior publicized statements on the underlying controversy." *Associated Press* v. *Walker*, 388 U.S. 130, 159 (1967).

The Court of Appeals found defamatory and unreliable Eringer's report, reprinted by Bermant, that Carto secretly observed employees through a one-way mirror. 746 F.2d at 1578 (*see* J.A. 17 [Complaint, Count One,

¶ 14(XXIII)].)[23] This allegation could scarcely be regarded as "improbable" or "scurrilous" in light of the indisputably reliable information provided to Bermant by a ranking Liberty Lobby official that respondents illegally used lie detector and voice stress tests on current and prospective employees as a means of ensuring "loyalty and operational security." (J.A. 72-74 [Bermant Aff. Appx. 25-26]); *see* 746 F.2d at 1577.[24] Indeed, the essence of both allegations is the same: that respondents were so concerned about internal security that they adopted intrusive measures to guard against disloyalty.

The same observations apply to the allegation that Carto "conducts his business by way of conference calls from a public telephone." (J.A. 15 [Complaint, Count One, ¶ 14(XIII)].)[25] This allegation cannot be regarded as "inherently improbable" respecting Carto, who was said by another reliable source to be secretly planning to establish a dictatorship. 746 F.2d at 1577. This is especially so in light

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23. This description was accompanied by an illustration of Carto, which was separately challenged. (J.A. 16 [Complaint, Count One, ¶ 14 (XIX)].)

24. The use of such tests is unlawful in the District of Columbia, where Liberty Lobby is headquartered, and is punishable by a fine, imprisonment, or both. D.C. Code §§ 36-801 to 803 (Michie 1981). Respondents have conceded that they engaged in such unlawful activities. Plaintiffs' Answers to First Set of Interrogatories by Defendants, ¶ 15(d).

25. The Court of Appeals' conclusion that a jury would regard this statement as implying criminal conduct by Carto is baseless. It is hard to imagine how a statement that Carto conducts business from public telephones "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). At most it would seem to portray Carto as either security conscious and fearful of eavesdropping, or reclusive. Neither portrayal rises to the level required by the Restatement, and the latter portrayal of Carto as reclusive was specifically held by the Court of Appeals to be nondefamatory. 746 F.2d at 1572 (allegation 4).

of the repeated descriptions of Carto by the *National Review* and the *Washington Post* as "reclusive," and the incessant concern for "operational security" revealed by the Chairman of Liberty Lobby's own Board of Policy. (*See* J.A. 72-73 [Bermant Aff. Appx. 25-26].)

Nor could any reasonable jury regard as implausible the allegation that a Carto front organization supported G. Gordon Liddy's 1968 Congressional Campaign. (J.A. 15 [Complaint, Count One, ¶ 14(XIV)].[26] This allegation is fully consistent with information that Bermant acquired from numerous sources that Carto uses a variety of "front" organizations to advance his political goals, and indeed used the very front organization identified by Eringer for other political purposes. (*See, e.g.*, J.A. 34, 39 [Bermant Aff. Appx. 7, 13].) Liberty Lobby's involvement in partisan political activity was also known to Bermant through Liberty Lobby's own report that it had been found to have violated federal election laws. (J.A. 83 [Bermant Aff. Appx. 36].)

The allegation in Eringer's article, on which Bermant relied, that a story in a Liberty Lobby house organ, *The Spotlight*, was a "total hoax," (J.A. 18 [Complaint, Count One, ¶ 14 (XXVII)]), is likewise fully consistent with what Bermant learned from other sources, both individuals and published articles: that Carto had previously participated in other hoaxes. (*See* J.A. 64-72 [Bermant Aff. Appx. 18-25]; J.A. 342 [Drosdik Dep. Tr. 7-8].) Indeed, Bermant had the word of Carto insiders on at least two such hoaxes. The *Los Angeles Times* reported that the director of the Institute for Historical Review, who acknowledged the "close connection" between the Institute and Carto, "admitted

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26. The Court of Appeals apparently thought that since Liddy engaged in criminal conduct during the 1972 Presidential campaign, the organization's association with him might therefore appear to carry a defamatory implication. 746 F.2d at 1578. However, the alleged association between the two groups occurred four full years prior to Liddy's criminal activity. Thus, nothing about the organization's alleged support of Liddy's 1968 campaign would seem to harm Carto's reputation.

. . . that the reward [offered by the Institute to anyone who could prove that the Holocaust had occurred] was a gimmick." (J.A. 64-67 [Bermant Aff. Appx. 18-21].) The hoax allegation was also consistent with Eringer's report that Carto had staged a trumped-up "protest" against Yugoslavia's Marshal Tito, using one of his employees to masquerade as a "Croatian exile." This allegation, which respondents never challenged, was later confirmed by the testimony of a former Carto employee. (J.A. 342 [Drosdik Dep. Tr. 7-8].)

The final allegation for which Eringer was a source involves the statement that Carto "owned" the Government Education Foundation (GEF) to which Liberty Lobby paid $6,000 rent per month. (J.A. 14-15 [Complaint, Count One, ¶ 14(XI)].) Eringer's information supporting this allegation was substantially corroborated in the *Washington Post* and the *National Review*, which reported that GEF is "Liberty Lobby's landlord" and the "sole owner . . . of Liberty Lobby's building," and that "Carto signed as Chairman of GEF when GEF purchased the Liberty Lobby building." (J.A. 57-58 [Bermant Aff. Appx. 11-12].) To the extent that Eringer's statements went beyond what was reported in those two articles, respondents have pointed to nothing that would likely have led Bermant to doubt the truth of Eringer's statements. Even if Eringer's information were not corroborated in all respects, this lack of corroboration would not be evidence of "actual malice." *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 332; *Beckley Newspapers Corp. v. Hanks*, 389 U.S. at 83-85. To the contrary, as this Court recognized in *St. Amant v. Thompson*, 390 U.S. at 733, partial verification of a story is evidence supporting the *absence* of "actual malice."

Two additional concerns raised by the Court of Appeals deserve only brief mention. Although the court stated that "Anderson admits that he did not care whether Eringer was reliable," 746 F.2d at 1579, this statement distorts

Anderson's testimony[27] and improperly relies on his supposed "admission." Anderson did not write the challenged articles and did not check their facts. He relied on the accuracy of his reporters and on his reporters' efforts to satisfy themselves that the information they had received was reliable. (J.A. 212-13 [Anderson Dep. Tr. 101].) What *Anderson* did or did not believe about Eringer's reliability is therefore irrelevant to what *Bermant* believed; and although respondents deposed both Anderson and Bermant, there is nothing in the record to indicate that Anderson and Bermant ever discussed Eringer or Bermant's reliance on Eringer as a source of information for the articles.

The Court of Appeals also improperly questioned Eringer's reliability because it believed that Eringer, unlike Bermant's other sources, could not have been deposed. In the first place, the court had no basis for this belief. That Eringer was living abroad would not have prevented respondents from taking his deposition pursuant to Rule 28(b)[28], and while respondents did not take his deposition, they never claimed that Eringer could not be found. Second, even if Eringer were in fact unavailable as a deposition witness in 1982, that would have no bearing on whether Bermant had any reason to doubt Eringer's reliability in 1981.[29]

Finally, the Court of Appeals' assumption that Eringer was unavailable for depositions is surely no excuse for holding a trial. The purpose of summary judgment is to assess

27. Anderson never testified that he didn't care whether Eringer was reliable. His testimony was that his own belief about Eringer's reliability "wouldn't have mattered," since he was relying on *Bermant's* work and not that of Eringer or any other individual source. (J.A. 185, 194 [Anderson Dep. Tr. 51, 67].)

28. Rule 28(b) permits depositions to be taken in a foreign country by notice, commission, or a letter rogatory.

29. The Court of Appeals' distinction between Eringer—whom the court said was unavailable to be deposed—and Bermant's other sources—who, being present in this country, could have been deposed—rings particularly hollow in light of the fact that respondents never bothered to depose the latter sources.

the proof to determine "whether there is a genuine need for trial." Advisory Committee's Note to Rule 56, 31 F.R.D. at 648. If Eringer could not be deposed, why should he be expected to be available as a trial witness? The unsupported hope that a witness might turn up is utterly inadequate to demonstrate a "need for trial." *See* 6 Moore's Federal Practice, *supra*, § 56.15[4], at 56-424 to 56-425.

2. Carto's Affinity With Hitler

The Court of Appeals also held that a trial was required to resolve two allegations relating to Carto's affinity with Adolf Hitler. The first of these was an illustration depicting Carto in a manner respondents claim looks like Hitler. (J.A. 16 [Complaint, Count One, ¶ 14(XIX)].) The second was a passage in the challenged article describing a gathering at which Carto was said to have joined in the singing of the infamous "Horst Wessel Lied," and to have delivered a speech in which he emulated Hitler's style. (J.A. 19 [Complaint, Count One, ¶ 14(XXIX)].)

Even if the illustration could reasonably be viewed as making Carto look like Hitler, which it cannot, the illustration cannot be said to have been published with actual malice in light of the ample information petitioners had from a multitude of sources, sources whose reliability respondents have not challenged, that Carto admired Hitler (J.A. 51, 78, 88-89 [Bermant Aff. Appx. 4, 31 and 41][30]) and that Carto's "dream was to succeed the Fuehrer as savior of the 'Aryan race'. . . ." (J.A. 77 [Bermant Aff. Appx. 30].) Given that respondents did not prevail on the allegation that Carto greatly admired Hitler and sought to succeed him, they can scarcely prevail merely because the illustration might bring home the link between Carto and Hitler more vividly to the reader. *See supra* notes 22, 30.

With regard to the written description of Carto's singing a song and making a speech, the Court of Appeals held

30. The Court of Appeals upheld summary judgment on the allegation that Carto was a "Hitler fan." 746 F.2d at 1576.

that petitioners were on notice of the description's probable falsity because the description was taken from an article co-authored by Joseph Spear, an *Investigator* editor, and previously published in *True* magazine, which had been the subject of a libel suit that was "settled to Carto's satisfaction." 746 F.2d at 1578. The Court of Appeals was wrong both factually and legally.

Although the specific descriptions of Carto singing the "Horst Wessel Lied" and emulating Hitler were derived from the *True* article, petitioners had ample information from other reliable sources, including both the *Congressional Record* and the *National Review*, that Carto had been the guest of honor at a gathering at which the guests sang the "Horst Wessel Lied," and that Carto had thereafter delivered an anti-Semitic speech. (J.A. 84 [Bermant Aff. Appx. 36-37].) In light of Carto's well-documented admiration for Hitler, no reasonable jury could doubt that, to Bermant, the articles' description of Carto's behavior rang true.

That the *True* article had itself been the subject of a libel suit could not have put petitioners on notice of the unreliability of that article's description of Carto's activities at the "Horst Wessel" party. In the first place, there is no evidence that petitioners were aware of the *True* litigation or settlement.[31] Second, there is no evidence that the *True* litigation revolved around the descriptions of Carto's behavior that have been challenged in the present litigation.

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31. Although Joseph Spear, one of the *True* article's authors, was later employed by *The Investigator*, Spear was never served with a copy of the complaint in the *True* litigation, never entered an appearance and did not sign the settlement agreement or the stipulation of dismissal. For the convenience of the Court, the Petition for Removal and the Stipulation and Order of Dismissal have been lodged with the Office of the Clerk of the Supreme Court.

No reasonable inference can be drawn that Spear had notice of the *True* litigation. Notably, although respondents had a year of discovery in which to inquire as to Spear's knowledge, they chose not to do so.

Respondents did not challenge every passage in *The Investigator* articles, and there is no reason to conclude that they had challenged the particular passages in the eight-page *True* article on which Bermant drew.[32] That an article has been challenged in some respects scarcely calls into question every passage in the article. This is especially so where, as here, the *True* report was substantially corroborated by other reliable sources.[33]

3. Carto's Plans for Sending American Blacks "Back to Africa"

The Court of Appeals also held that a jury question existed concerning whether the articles' allegation that Carto's "repatriation" scheme envisioned the "forced deportation" of blacks to Africa was made with actual malice. 746 F.2d at 1578. The court recognized that Bermant's sources support the allegations that (1) Carto created the

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32. Although Carto's affidavit refers to a "compensatory" article that *True* published as part of the settlement, (J.A. 101 [Carto Aff. ¶ 8]), this "article" is simply an interview with two Liberty Lobby employees and in no sense can be regarded as a retraction of anything in the prior article. (*See* J.A. 103-107.)

33. In any event, even were Spear a party to the settlement, his participation in the *True* settlement would be irrelevant to the present proceedings. Rule 408 of the Federal Rules of Evidence provides that evidence of a compromise or settlement "is not admissible to prove liability for or invalidity of the claim or its amount." The Advisory Committee's Note following Rule 408 provides two underlying principles for the rule: (1) that the evidence is irrelevant, since a settlement offer "may be motivated by a desire for peace rather than from any concession of weakness of position," *see* Sternberger v. United States, 401 F.2d 1012, 1018 (Ct. Cl. 1968); and (2) that there exists a strong "public policy favoring the compromise and settlement of disputes," *see* Perzinsky v. Chevron Chemical Co., 503 F.2d 654, 658 (7th Cir. 1974). *See generally* 23 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5302 (1980 and Supp. 1985). Given these substantial policy concerns, an inference that the *True* settlement gave Spear reason to doubt the truth of the *True* article simply may not be drawn.

Joint Council for Repatriation, and (2) the Council's purpose was to "send[] American blacks back to Africa." *Id.* However, because one of Bermant's sources referred to the scheme as one for "voluntary repatriation," the court thought that a triable question remained whether Bermant's characterization of the scheme as envisioning "forced deportation" was made with actual malice.

Contrary to the conclusion of the Court of Appeals, Bermant had no reason to doubt that his characterization of Carto's scheme as envisioning "forced" deportation was accurate. Bermant relied, *inter alia*, on a declaration filed in another lawsuit by California lawyer William Cox, a former police officer and Justice Department official, which stated that the "Joint Council for Repatriation" was "for the *deportation* of American Blacks to Africa."[34] (*See* J.A. 313 [Cox Dep. Tr. 20] (emphasis added)).

That one source characterized Carto's "repatriation" scheme as "voluntary" does not mean that Bermant was required to reject Cox's characterization, especially in light of credible information from many other sources that Carto covertly sought to establish a dictatorship, "secretly promoted" the Joint Council, and feared grave harm to his operations if news of the Joint Council's connection with Liberty Lobby were revealed. (J.A. 61-62 [Bermant Aff. App. 15].) In light of what he had learned about respondents' other activities, including their use of front organizations to disguise their true purposes, *see supra* pages 30-37, Bermant's characterization of Carto's scheme as one for forced deportation was surely a "possible rational interpretation[]" giving a jury no leeway to draw a conclusion that he wrote with actual malice. *Time, Inc. v. Pape*, 401 U.S. at 290; *see also Bose v. Consumers Union*, ____ U.S. at ____, 104 S. Ct. at 1966.

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34. The Court of Appeals correctly recognized that Cox's role as an attorney representing a party in litigation with respondents does not render him unreliable. 746 F.2d at 1576 n.13.

CONCLUSION

The Court of Appeals wrongly concluded that the standards for evaluating whether a public-figure libel case could reach the jury on the issue of "actual malice" are different from the standards that must be applied in evaluating a motion for a directed verdict. The constitutional standard of "clear and convincing evidence" must be applied before trial on a motion for summary judgment, at trial on a motion for a directed verdict, after trial on a motion for judgment n.o.v., and on appeal.

Because respondents failed to adduce *any* evidence, let alone any "clear and convincing evidence," that petitioners' articles were published with "actual malice," the District Court correctly entered summary judgment for petitioners.

For the reasons described above, we respectfully request that the order of the Court of Appeals be reversed.

July 18, 1985

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NO. 84-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

-v.-

LIBERTY LOBBY, INC. and WILLIS A. CARTO,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Was the Court of Appeals below correct in declining to attempt to impose at the summary judgment stage of a public figure libel case the heightened burden of proof with "convincing clarity" of a libel defendant's actual malice in the publication of false and defamatory statements?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. Liberty Lobby, Inc. is a nonprofit District of Columbia corporation. It is affiliated with Cordite Fidelity Corporation, a District of Columbia corporation.

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JURISDICTION

Jurisdiction of this Court to review the judgment of the Court of Appeals is by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1) (1982). Petitioners' petition for a writ of *certiorari* was granted by this Court on June 3, 1985.

STATUTORY PROVISION INVOLVED

Rule 56(c) of the Federal Rules of Civil Procedure provides:

> *Motion and Proceedings Thereon.* The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Fed. R. Civ. P. 56(c).

STATEMENT OF THE CASE

Respondents set forth below their counter-statement of the case.[1]

The respondent Liberty Lobby is a not-for-profit corporation based in Washington, D.C. It is engaged in the publishing business and publishes *The Spotlight*, a weekly newspaper reporting news and commentary from a non-conforming, populist viewpoint highly critical of current economic and governmental policies. The treasurer of Liberty Lobby is the respondent Willis A. Carto. Because of their activities in the public sphere, the District Court ruled that both Mr. Carto and Liberty Lobby are "limited purpose public figures" for purposes of federal libel law, a finding that respondents did not contest before the Court of Appeals.

This case arose out of the publication of two articles in the October 1981 issue of *The Investigator* magazine (now defunct), whose publisher was the petitioner Jack Anderson. *The Investigator* was owned by the petitioner Investigator Publishing Company, a Texas corporation, whose president and chief executive officer was the petitioner Bill E. Adkins.

The two articles appeared under the heading, "America's Neo-Nazi Underground." One article, whose subject primarily was Mr. Carto and Liberty Lobby, was entitled "The Private World of Willis Carto," authored by Charles Bermant; the other was entitled "Yockey, Profile of an American Hitler," attributed to John C. Obert although also written by Bermant. A single introduction, written by petitioner Jack Anderson,

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1. The issue before this Court for review, although important, is narrow. Regrettably, the Statement of the Case in Petitioners' Brief, and indeed their entire brief, is a continuation of the same theme employed by petitioners at each stage of this litigation—an inflammatory and irrelevant attack on respondents Liberty Lobby and Willis A. Carto, apparently designed to attempt to poison the minds of the Court against respondents, while avoiding and indeed obfuscating the specific issue of the case and the specific facts relevant to this issue.

although signed "The Editors," preceded the two articles.[2] The articles depicted Mr. Carto and Liberty Lobby as neo-Nazi, fascist, anti-Semitic and racist. They contained a plethora of anecdotes purporting to report Mr. Carto's activities, entirely false although portrayed as historical fact, as well as drawings purporting to depict Mr. Carto as a moustached Hitleresque figure spying on his employees through a one-way mirror and making a speech with his arm raised in a Nazi-like salute.[3]

Before the October 1981 *Investigator* was published and distributed, William McGaw, editor of *The Investigator*, reviewed the articles and told petitioner Bill Adkins, president of the company, that the articles were "ridiculous" and "terrible." He conveyed his objection to the publication of the articles to petitioners Adkins and Anderson, to no avail. He also viewed the illustration of Carto portrayed as Hitler and informed the art director that it "could be libelous" and reflected that it be removed from the publication, again to no effect. (J.A. 92 [McGaw Aff. ¶ 19].)

Having received an advance copy of the October 1981 issue of *The Investigator* prior to its distribution, Liberty Lobby and Mr. Carto, through counsel, delivered a letter to petitioner Jack Anderson pointing out in detail the false and libelous statements and demanding that the magazine not be released absent correction of the falsehoods. (J.A. 21 [Complaint ¶ 20].) The petitioners nevertheless proceeded with a nation-wide distribution of the October 1981 *Investigator* without alteration or further examination of the falsehoods of which they had been notified.

Thereafter, on September 15, 1981, respondents Liberty Lobby filed suit in the United States District Court for the District of Columbia, invoking the Court's diversity of citizenship jurisdiction, against petitioners Investigator Publishing

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2. The articles are reproduced at Joint Appendix 24-38.

3. The specific content of the articles is described more fully below.

Company, Anderson, and Atkins,[4] alleging that two of the illustrations and twenty-eight statements contained in the articles were false, defamatory, and published with actual malice on the part of the petitioners. (J.A. 10-23 [Complaint].)

The petitioners moved for summary judgment, claiming that respondents could not show with "convincing clarity" that they had published the offending statements with actual malice, under the standards of *New York Times v. Sullivan,* 376 U.S. 254 (1964), and subsequent cases. In support of their motion, they submitted the affidavit of Charles Bermant, author of the challenged articles, averring his belief that the statements contained therein were true and accurate. Bermant's affidavit contained an appendix listing his sources for the individual statements challenged as libelous in the lawsuit. (J.A. 34-91 [Bermant Aff. and App.].)

During the discovery period, several depositions were taken, including those of Mr. Bermant and petitioner Anderson, and in opposing the motion for summary judgment respondents submitted several affidavits. The Court of Appeals fairly summarized as follows the evidence in the District Court record regarding preparation of the articles bearing on the defamation claims before this Court for review:

> The "Yockey" and "Private World" articles were written by Charles Bermant, although the former appeared under the byline of the magazine's staff writer Jon Obert, because Anderson did not like more than one piece attributed to a single author in any issue. Bermant joined Anderson's staff in March 1981, having previously worked in Anderson's office as an intern, but the story, according to the appellants, began much earlier. In November 1969, Joseph Trento and Joseph Spear published an article in *True* magazine entitled "How Nazi Nut Power Has Invad-

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4. Also named as defendants were William C. McGaw, editor of *The Investigator*, and Jay J. Armes; these defendants were dismissed in the District Court and are not before this Court.

ed Capitol Hill."[3] Carto and Liberty Lobby sued *True*, claiming that the article defamed them. The lawsuit ended with a settlement under which *True* paid Carto a sum of money and published a favorable article about Liberty Lobby. In May 1981, Spear was working for Anderson, now as the Managing Editor[4] of *The Investigator*. He assigned Bermant to investigate the Yockey and Carto stories and, plaintiffs claim, gave him drafts containing the statements made in the *True* article from which to work. Appellants' Brief at 29-30. Although the affidavit that Bermant filed with the district court does not list the Trento and Spear articles as a source, *see* Bermant Affidavit at ¶¶ 8-17, the detailed appendix to the affidavit does identify it as a source, occasionally as the sole source, for some of Bermant's claims. *See, e.g.*, Bermant Affidavit Appendix at 16-17.

Bermant conducted other research, which the district court characterized as "exhaustive" and "thorough." 562 F.Supp. at 206, 209. He reviewed the products of a Freedom of Information Act request, sought information about Carto and Yockey in libraries, and interviewed a number of people. One of his major sources was Robert Eringer, a freelance journalist; several of the allegedly defamatory statements were based solely on Eringer's claims. Bermant never met Eringer and his deposition recounts only one telephone conversation with him. Eringer sent Bermant a draft of an article containing some information about Liberty Lobby. That draft has since been lost, probably "thrown away." Bermant Deposition at 71-72. Eringer never identified any of his sources to Bermant, nor did Bermant inquire. Anderson testified that it did not matter to him whether Eringer was reliable, for "[w]e did not intend to use his material." Anderson Deposition at 51. Eringer, believed at the time of the proceedings below to live in London, was not deposed for this lawsuit. Another of Bermant's major sources was William Cox, an attorney

representing a plaintiff who had sued an organization related to the appellants in the California courts.[3] Bermant interviewed Cox and also relied on the "Declaration of William Cox Regarding the Urgency of the Proceedings," a document apparently produced for the California lawsuit.

Bermant "spent . . . several days" writing first drafts of the articles, which were then edited by Obert. Bermant Affidavit at ¶ 17. There is evidence that several of the allegedly defamatory statements were added to the "Private World" article during the editing process. Bermant Deposition at 119. *The Investigator*'s art department produced several illustrations for the issue—two of which are also subjects of defamation claims.

3. At oral argument, counsel for the appellees conceded that when the *True* article was published, Trento and Spear worked for Jack Anderson. Jan. 20, 1984 Tr. at 33-34.

4. In their briefs, both sides identify Spear as the magazine's managing editor, although he was listed as an associate editor on the masthead of the October 1981 issue. Regardless of title, he was in a position of authority over Bermant, also listed on the masthead as an associate editor.

5. Cox's client, Mermelstein, sued the Institute for Historical Review, an organization associated with Carto. The Institute had offered an award of $50,000 to the first person able to prove that Hitler's mass extermination of Jews had occurred. Mermelstein claimed the prize, and the Institute allegedly refused to pay.

746 F.2d at 1566-67.

The District Court granted the motion for summary judgment, ruling that Bermant's affidavit conclusively established the defendants' lack of actual malice. The District Court did not analyze separately the sources Bermant claimed to have relied upon for each of the individual alleged defamations; instead, the Court based its finding "as a matter of law" of lack of ac-

tual malice on Bermant's account of his review of a host of articles published in a variety of widely circulated newspapers and periodicals. The Court acknowledged the "patent unreliability" of the *True* magazine article as a source, 562 F.Supp. 201, 209, and that the plaintiffs had asserted the recklessness of reliance on other sources, but reasoned that its conclusion of lack of actual malice as a matter of law was unaffected because of "the reality that plaintiffs manage to attack only a small proportion of the sources that defendants relied upon," *id.* at 209.

Liberty Lobby and Carto appealed the District Court's grant of summary judgment to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals rejected the contention of Anderson and the other petitioners that Liberty Lobby and Carto were "libel-proof" and that their claim should thus be rebuffed without further ado. 746 F.2d at 1568-69:

> We are not yet ready to adopt for the law of libel the principle that 10,000 repetitions are as good as the truth. We see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth.

746 F.2d at 1568.

The Court of Appeals affirmed the District Court's dismissal of the challenges to four of the alleged defamations, not because of lack of a showing of actual malice but because the Court of Appeals ruled that the challenged statements were not in fact defamatory in content. *Id.* at 1572. The Court affirmed the dismissal of four additional challenged statements as protected opinion, despite its invective-laden characterization of Carto and Liberty Lobby.[5] *Id.* at 1573.

However, the Court of Appeals faulted the District Court's

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5. The Court of Appeals refused to hold actionable such "opinionated indictments" as 'fascism,' 'Red-baiting,' 'perverted nationalism,' and 'denigration of democracy . . .' *Id.* at 1573.

failure to consider individually the evidence of the defendant's lack of good faith as to the separate allegations of defamations, reasoning:

> Inquiry into the question [good faith reliance on reputable sources], however, cannot be conducted in gross. It is the individual allegedly libelous statement (taken in its proper context) rather than the accuracy of the publication as a whole, which is on trial. A falsehood published with actual malice is no less actionable for being surrounded by an array of well documented and carefully researched allegations. The accompanying truth cannot eliminate the libel, and is indeed the most effective means of increasing its harm by increasing its credibility.

Id. at 1574. The Court examined the evidence in the record regarding the defendants' sources for each of the remaining allegations of defamation and affirmed the dismissal of an additional nine allegations of defamation "which Bermant could show were based on reports previously published in reputable sources," *id.* at 1576, or which Bermant stated were based on interviews with persons in positions which made it reasonable to rely on their assertions. *Id.* at 1575-77.

The Court, however, found that as to nine of the allegations of defamation, a jury could find they were false and made with actual malice, because the sources allegedly relied upon by Bermant were inadequate for the good-faith defense of lack of actual malice. Seven of these nine allegations were anecdotes purporting to describe, as historical fact, Carto's activities and portraying him as ridiculous, reprehensible, or dishonest; two of the alleged defamations were drawings purporting to illustrate the anecdotes and portraying Carto as a moustached, Hitleresque figure spying on his employees and raising his arm in a Nazi-like salute. In analyzing the record, the Court found that the sole sources for these defamations were the *True* magazine article, which had been the subject of a successful defamation action, and the mysterious Robert Eringer, about

whom Bermant and Anderson knew nothing and had no basis to assess his reliability as a source. *Id.* at 1577-79.

In finding that the plaintiffs had demonstrated sufficient basis to show the defendants' actual malice as to these nine alleged defamations, and reversing the District Court's grant of summary judgment as to these allegations, the Court of Appeals declined to impose the "clear and convincing" burden of proof at the summary judgment stage. *Id.* at 1570-71.

Petitioners sought a writ of *certiorari*, which was granted by this Court solely as to the issue of whether the "clear and convincing" burden of proof of actual malice in a public figure libel case should be applied at the summary judgment stage.

SUMMARY OF ARGUMENT

For the purpose of safeguarding freedom of the press guaranteed by the First Amendment, this Court has overlaid the common law of defamation with special substantive rules. Even for damage to reputation resulting from the publication of false and defamatory statements, this Court has ruled that a public figure libel plaintiff may not obtain relief unless he can prove with "convincing clarity" that the defendant published the falsehood with "actual malice," that is, with subjective knowledge that it is false, or with reckless disregard of whether it is true. *New York Times v. Sullivan,* 376 U.S. 254, 280 (1964). The Court has extended the "actual malice" standard of liability to a broad class of libel plaintiffs, not only public officials but also private citizens who, by exercise of First Amendment rights, have involved themselves in particular public issues and controversies and thus attain the status of "limited purpose public figures." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345 (1981).

However, this Court has always recognized the "individual's right to the protection of his own good name," *Gertz v. Robert Welch, Inc.,* 418 U.S. at 341, that underlies the law of defamation and has consistently refused to extend special procedural

protections to libel defendants in addition to the constitutional protections of the substantive law. *Calder v. Jones,* 104 S.Ct. 1482 (1984); *Hutchinson v. Proxmire,* 443 U.S. 111, 120 n.9 (1979); *Herbert v. Lando,* 441 U.S. 153 (1979).

Respondents herein are limited purpose public figures, having for many years spoken out on controversial public issues of the day, and thus are subject to the stringent impediments against maintaining a lawsuit for damage to their reputations as a result of the publication of defamatory falsehoods. The difficulty they face in defending their reputations from defamatory falsehoods is a direct result of their participation in public life, which this Court has consistently ruled is at the heart of the First Amendment's protection. *Dun & Bradstreet v. Greenmoss Builders, Inc.,* 53 U.S.L.W. 4866 (June 25, 1985). The First Amendment interests of news media libel defendants are adequately protected by the existing substantive law; to impose any additional procedural impediments to protection of reputation from defamatory falsehoods would deter private citizens from participation in public life for fear of incurring defenseless attacks on reputation.

The Court of Appeals below correctly applied the existing law of summary judgment, in declining to impose at the summary judgment stage the heightened burden of proof of actual malice with "convincing clarity." Proof of actual malice necessarily involves an evaluation of the libel defendant's subjective state of mind, which depends on the evaluation of demeanor and credibility of witnesses and is thus inappropriate at the summary judgment stage. Moreover, in public figure libel cases, such as the instant case, where the critical issue is the defendant's actual malice in publishing the defamatory falsehoods, it would be inappropriate and unfair for the action to be extinguished without trial solely on the basis of self-serving declarations of the moving party as to his state of mind, untested by cross-examination before the trier of fact.

The Court of Appeals correctly ruled that application of the heightened burden of proof with "convincing clarity"

necessarily involves a weighing of all the evidence, as opposed to the determination of the existence of evidence, and thus is inappropriate at the summary judgment stage. Moreover, establishment of the heightened burden of proof for the existence of actual malice indicates the importance of the correctness of the decision, *Addington v. Texas,* 441 U.S. 418, 423 (1979); such an important decision, involving both an individual's interest in reputation and the First Amendment interests implicated in a libel judgment, should be made on the basis of a complete trial record with opportunity for the court and the trier of fact, through cross-examination, to evaluate the credibility and weight of all the evidence.

The constitutional duty of independent appellate review of the determination of actual malice, *Bose v. Consumers Union,* 104 S.C5. 1949 (1984), is not a substitute for determination by the trier of fact of factual issues but a reviewing function to ensure that the constitutional principles regarding defamation actions are correctly applied. The importance of this constitutional duty of review requires a complete trial record. Moreover, to deny the respondents an opportunity to maintain their case at trial would abrogate the constitutional right to trial by jury.

In this case, the Court of Appeals correctly ruled that the respondents had proferred sufficient evidence regarding the defendants' actual malice in the publication of the falsehoods defaming the respondents.

This evidence included exclusive reliance for many of the false and defamatory statements on an article that had earlier been the subject of a successful action for defamation and upon an informant, about whom the petitioners knew nothing more than his name and about whom they neither knew nor cared to know anything bearing on his reliability as a source. In addition the editor of the magazine himself expressed both opposition to the publication of the story and his belief that the content might well be libelous. Further, the respondents had notified the petitioners before publication of the defamatory article which

specific allegations were untrue and defamatory and demanded that the false allegations be deleted. The petitioners did not respond to the letter and declined to make any inquiry as to the accuracy of the questioned portions of the article. Instead they published it in its original form.

The Court of Appeals correctly ruled that summary judgment should not have been granted and that the evidence of the parties should be presented and tested at trial according to the ordinary procedures of our system of justice.

ARGUMENT

I. THE EFFECTIVE IMMUNITY FROM LIABILITY FOR FALSE AND DEFAMATORY STATEMENTS SOUGHT BY THE DEFENDANTS AND *AMICI* SUPPORTING THEM DOES NOT SERVE THE LEGITIMATE INTERESTS PROTECTED BY THE FIRST AMENDMENT.

A. Legitimate First Amendment Interests are Adequately Protected by Existing Substantive and Procedural Law Regarding Libel Prosecutions.

Since this Court's historic decision in *New York Times v. Sullivan,* 376 U.S. 254 (1964), the common law of defamation has been overlaid with special substantive safeguards to protect First Amendment guarantees of freedom of the press.

Notable among these protections is the immunity from liability for defamation of expressions of constitutionally protected opinion, "however pernicious," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). To give practical effect to the principle that "[u]nder the First Amendment there is no such thing as a false idea," *id.*, the federal courts have fashioned stringent rules to delineate statements of fact, which may potentially be actionable for defamation, from constitutionally protected opinion which "depend[s] for its correction not on the conscience of judges and juries but on the competition of other

ideas," *id.* See, *e.g., Ollman v. Evans,* 750 F.2d 970 (D.C. Cir. 1984) *(en banc), cert. denied,* 53 U.S.L.W. 3836-37 (May 2, 1985, No. 85-1524). Indeed, the Court of Appeals below in the instant case applied these rules in holding that the petitioners' invective-laden characterizations of respondents Carto and Liberty Lobby, which had been challenged as libelous in the district court lawsuit, were constitutionally protected opinion. 746 F.2d at 1572-74.[6]

In the service of further safeguarding First Amendment interests, the Court has erected as an additional rampart an immunity from liability for publication of an untrue and defamatory statement of fact regarding a public official or public figure, unless the public figure plaintiff can prove that the defendant published the falsehood with "actual malice," that is, with subjective knowledge that it is false, or with

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6. Far from the displaying a lack of solicitude toward the interests of media defendants, the Court of Appeals held immune from liability as constitutionally protected opinion statements in petitioners' articles, among others, characterizing accusing petitioners Carto and Liberty Lobby of "inherent or incipient fascism," "virulent anti-Semitism to dissolve the social fabric; the pitting of group against group and race against race to weaken national unity; incessant Red-baiting to smokescreen fascist propaganda; superpatriotism and a perverted brand of nationalism; and the creation of a 'survivor mentality' to further fragment society. . . ." 746 F.2d at 1573.

Respondents Carto and Liberty Lobby had vigorously challenged these statements and others as false and libelous in the district court and the Court of Appeals. The implication found in petitioner's Brief at p.7 n.9 that respondents have conceded the truth of these statements is entirely unfounded. That respondents have not challenged the Court of Appeals' finding as to these statements is merely a recognition that under the current state of law such "political rhetoric," 746 F.2d at 1574, "however pernicious," *Gertz, supra,* 418 U.S. at 339, is generally immune from liability as constitutionally protected opinion.

reckless disregard of whether it is true. *New York Times v. Sullivan, supra,* 376 U.S. at 280; *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 351.

The Court has extended the "actual malice" standard of liability to a broad class of libel plaintiffs, not only elected public officials, *New York Times, supra,* but also famous persons prominent in the public eye, *Curtis Publishing Co. v. Butts, supra.* Even more significantly, this Court has ruled that the "actual malice" requirement also applies to a "limited purpose public figure," that is, a private citizen libel plaintiff who, by his public statements and activities, through his exercise of First Amendment rights, has involved himself in a particular public controversy. *Gertz v. Robert Welch, Inc.,* 418 U.S. at 345; see also, *Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d 1287 (D.C. Cir.), *cert. denied,* 449 U.S. 898 (1980).

In yet another measure which shields libel defendants from responsibility caused by their damaging words and thus arguably enhances the First Amendment, this Court has established the requirement that a public figure libel plaintiff, to prevail at trial, must not only prove the existence of the defendant's actual malice in publishing the defamatory falsehood; the plaintiff bears a heightened burden of proving actual malice with "convincing clarity," *New York Times v. Sullivan, supra,* 376 U.S. at 285-86, or with "clear and convincing proof," *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 342. Moreover, the trial and appellate court, "as expositors of the Constitution," must conduct an independent review of all the evidence to determine whether the plaintiff has established actual malice with convincing clarity. *Bose Corp. v. Consumers Union of the United States,* 104 S.Ct. 1949, 1965 (1984).

However, while establishing and developing this body of law designed as fortifications against actions by persons defamed and to safeguard First Amendment interests of libel defendants, this Court has consistently rejected invitations to erect procedural barriers to the maintenance of defamation ac-

tions as a "form of double counting" not required for the protection of those interests. *Calder v. Jones,* 104 S.Ct. 1482 (1984). As recently stated on behalf of a unanimous Court,

> [T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. . . . We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. See, *e.g., Herbert v. Lando,* 441 U.S. 153 (1979) (no First Amendment privilege bars inquiry into the editorial process). See also *Hutchinson v. Proxmire,* 443 U.S. 111, 120 n.9 (1979) (implying that no special rules apply for summary judgment).

Id., 104 S.Ct. at 1488.

The petitioners have offered no persuasive reason why the substantive law developed by this Court and the lower Courts does not adequately secure First Amendment interests in the context of libel prosecutions, nor any reason to depart from the long-standing principles governing summary judgment noted by this Court in *Hutchinson v. Proxmire, supra,* 443 U.S. at 120 n.9.[7] The spectre raised by *amici* supporting the petitioners of some libel plaintiffs employing baseless lawsuits to harass and silence their critics is a concern for which Rule 11 of the Federal Rules of Civil Procedure provides ample remedy—the award of sanctions, attorney's fees, and costs against a party and/or counsel who engages in baseless litigation or litigation for the

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7. The sophistry of the petitioners' contention that the Court of Appeals departed from ordinary principles governing summary judgment is discussed *infra* at Section II.A.

purpose of harassment.[8] There is no reason to doubt that trial and appellate courts will be especially solicitous, as they should be, where First Amendment considerations are present, to use their authority to impose sanctions for harassing or baseless use of litigation by a party or counsel in a particular case, *cf. Herbert v. Lando, supra,* 441 U.S. at 177-180 (Powell, J., concurring). Accordingly, no First Amendment considerations are present compelling the establishment of an extraordinary procedural barrier of general application to all public figure libel plaintiffs that would have the practical effect of making such cases all but impossible to maintain.

B. A Private Citizen's Advocacy of Views in the Public Sphere is Desirable in our Democracy and Protected

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8. Rule 11 of the Federal Rules of Civil Procedure, as amended Apr. 28, 1983, provides, in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of ligitation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

by the First Amendment, but May Well Result in the Citizen's Achieving "Limited Purpose Public Figure" Status for Purposes of Libel Law.

The communications and news media were never intended to be the exclusive beneficiaries of the freedom of speech and expression protected by the First Amendment. In our democratic and pluralistic society, spirited expression and public debate by citizens on matters of public concern is entitled to heightened First Amendment protection, as benefitting not only the individual advocate but our society in general.

This principle was very recently reaffirmed by this Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866 (June 25, 1985). Justice Powell, in announcing the judgment and speaking for a plurality of the Court, recounted the Court's long-standing commitment to the protection of speech on public issues:

> It is speech on " 'matters of public concern' " that is at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). As we stated in *Connick v. Myers*, 461 U.S. 138, 145 (1983), this "special concern [for speech on public issues] . . . is no mystery":
>
> > "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection. *NAACP v. Claiborne Hardware*

> *Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 445, 467 (1980)."

Id., 53 U.S.L.W. at 4867-68.[9]

The respondents Carto and Liberty Lobby have for many years spoken out on the public issues of the day; their views have engendered controversy and criticism. By their exercise of rights this Court has held central to the values protected by the First Amendment, respondents "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" and have "invite[d] attention and comment," *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 345. However, the inevitable result of respondents' exercise of First Amendment-protected rights of speech on public issues has been the attaining of limited public figure status, and the concomitant "increased risk of injury from defamatory falsehood concerning them," *id.*

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9. Although members of this Court in recent opinions have articulated differing views on the actual malice standard and its application, nevertheless there appears no division among the Court on the central value of speech on matters of public concern. See, *Connick v. Myers*, 103 S.Ct. 1684, 1697 (1983) (Brennan, J., joined by Marshall, Blackmun, and Stevens, dissenting):

> The First Amendment affords special protection to speech that may inform public debate about how our society is to be governed—regardless of whether it actually becomes the subject of a public controversy.
>
> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1965). "The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

The price exacted upon respondents as a consequence of vigorous exercise of First Amendment rights on matters of public concern is a heavy one; under the application of the law of defamation since *New York Times v. Sullivan, supra,* it is a price exacted upon any citizen who similarly chooses to speak out on public issues.

C. It is Against Public Policy and the Values Protected by the First Amendment, for Private Citizens Who Become Limited Purpose Public Figures, Through Exercise of First Amendment Rights, To Have No Practical Recourse in Law for Damage to Their Reputations by False and Defamatory Statements and Publications.

Respondents submit that the panoply of protections now indelibly writ as substantive law regarding public figure libel plaintiffs more than adequately safeguards the legitimate First Amendment interests of the news media; to erect any further procedural barriers to the maintenance of a defamation action for a false and defamatory statement would harm First Amendment rights by deterring citizens from speaking out on public issues for fear that they would incur baseless attacks upon reputation for which no effective recourse is available.

Respondents Carto and Liberty Lobby acknowledge that in the marketplace of ideas that is the hallmark of our democracy that the views and positions they express are subject to criticism, attack, and even mischaracterization.[10] However, the scurrilous and false anecdotes contained in the articles published by petitioners, offered as historical fact, stating that Mr. Carto was in effect deriving personal profit from organizational assets, that he emulated Hitler in appearance and action, and that he en-

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10. Respondents have consistently denied the accuracy of the characterization of themselves and their views as "racist," "anti-Semitic," or "fascist," a mischaracterization persisting in the Brief of Petitioners.

gaged in bizarre and secretive conduct in regard to his employees,[11] are defamatory and actionable.

Such scurrilous and false anecdotes of a personal nature are apparently designed to, and have the effect of, holding the respondents open to ridicule and opprobrium, encouraging the public to discount and reject the views respondents expound, and discouraging others from associating with them. The harm to respondents' dignity and reputation is precisely that which this Court has identified as a basic consideration of our constitutional system and entitled to the protection of the law. See *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 341.

The First Amendment is not served by imposing at a preliminary stage of litigation a procedural barrier to libel plaintiffs that in effect makes such actions impossible to maintain.[12] How many citizens will avoid engaging in public life or publicly commenting on issues of concern for fear of opening themselves and their families to attack upon reputation and dignity against which they are powerless to respond?[13]

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11. See opinion of the court below, 746 F.2d at 1577-79.

12. The virtually insurmountable difficulty of meeting a burden at the "clear and convincing" level at the summary judgment stage is discussed *infra,* at Section II.C.

13. As Justice White has earlier noted:

> It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head. [citations omitted] Davis Riesman, writing in the midst of World War II on the fascists' effective use of defamatory attacks on their opponents, commented: "Thus it is that the law of libel, with its ecclesiastic background and domestic character, its aura of heart-balm suits and crusading nineteenth-century editors, becomes suddenly important for modern democratic survival." Democracy and Defamation: Fair Game and Fair Comment I, 42 Col.L.Rev. 1085, 1088 (1942).

II. A PUBLIC FIGURE LIBEL PLAINTIFF, BURDENED WITH THE REQUIREMENT OF ESTABLISHING THE DEFENDANT'S ACTUAL MALICE AS WELL AS THE FALSITY OF THE DEFAMATION, CANNOT BE REQUIRED AT THE PRE-TRIAL SUMMARY JUDGMENT STAGE TO SATISFY THE "CLEAR AND CONVINCING" BURDEN OF PROOF OF ACTUAL MALICE, IN ORDER TO MAINTAIN HIS CASE AT TRIAL.

A. It is Settled Law, as Expounded by This Court and Other Federal Courts, That Summary Judgment May Not be Employed to Extinguish a Plaintiff's Claim Without Trial, Where Issues of State of Mind and Credibility are Present.

The Court of Appeals below declined to impose upon a public figure libel plaintiff, in order to survive the defendant's motion for summary judgment and maintain his case at trial, the requirement not only of demonstrating facts from which a reasonable jury could find actual malice but also from which actual malice could be found at the heightened burden of proof of "convincing clarity." 746 F.2d at 1570. The Court reasoned:

> Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontraverted facts as well.

Id.

The petitioners accuse the Court of Appeals of "unprecedented restructuring of the summary judgment rule," Peti-

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NOTES (*Continued*)

Gertz v. Robert Welch, Inc., supra, 418 U.S. at 400 (White, J., dissenting).

tioners' Brief at 17. However, the Court of Appeals, far from adopting an innovative approach, was merely following settled principles of the law of summary judgment.

1. Where Motive and Intent are at Issue, the Plaintiff is Entitled to Confront and Cross-Examine Witnesses at Trial, so That the Judge May Consider Their Credibility and Demeanor in Finding Facts.

According to the law established by this Court, actual malice of a libel defendant is defined as "the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true," *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 351. The Court has further stated that the test is not an objective one of "whether a reasonably prudent man would have published, or would have investigated before publishing," but whether there is "sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson, supra,* 390 U.S. at 731. In short, the critical issue is the subjective state of mind of the defendant.

This Court has reaffirmed, and the Court of Appeals did no more than apply, the long-standing guideline that "[t]he proof of 'actual malice' calls a defendant's state of mind into question, *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and does not readily lend itself to summary disposition," *Hutchinson v. Proxmire,* 443 U.S. 111, 120 n.9 (1979). This principle has long been the guide where motive or intent is an essential element of the cause of action challenged by a motion for summary judgment, and received its classic expression in the context of anti-trust litigation, where this Court noted:

> [S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only

> when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962).[14]

The point, of course, is not that summary judgment is disfavored when state of mind is at issue; rather, the nature of inquiry into a subjective mental state frequently involves the weighing of credibility by the court and the consideration of varying inferences[15] that may be drawn from the available evidence, an endeavor that by its nature does not lend itself to summary disposition. Thus, the Courts of Appeals, in a wide variety of legal and factual settings, have consistently disapproved the disposition by summary judgment where state of mind is an issue.[16]

Respondents do not quarrel with the general proposition advanced by the petitioners that a party opposing a summary judgment may not defeat the motion merely by speculating that a material issue of fact may emerge at trial. Nor is summary judgment automatically precluded simply because the case is an

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14. The validity of the *Poller* analysis remains unchallenged and was reaffirmed by this Court in *Agosto v. Immigration and Naturalization Service,* 436 U.S. 748, 756-57 (1978).

15. *United States v. Diebold,* 369 U.S. 654, 655 (1962).

16. See, *e.g., Mazaleski v. Treusdell,* 562 F.2d 701 (D.C.-Cir. 1977) (intent to retaliate for exercise of right of free speech); *Cross v. United States,* 336 F.2d 431 (2d Cir. 1964) (credibility of movants' witnesses); *Magill v. Gulf & Western Industries, Inc.,* 736 F.2d 976 (4th Cir. 1984); *Morrison v. Nissan Co., Ltd.,* 601 F.2d 139 (4th Cir. 1979) (existence of intent to fix prices for automobile repairs); *Charbonnages de France v. Smith,* 597 F.2d 406 (4th Cir. 1979) (intent of parties regarding contract formation); *Croley v. Matson Navigation Co.,* 434 F.2d 73 (5th Cir. 1970) (employer's knowledge of dangerous conditions); *Consolidated Electric Co. v. United States,* 355 F.2d 437 (9th Cir. 1966) (fraud).

anti-trust or other cause of action where state of mind is an element, where no genuine issue of material fact is present.

However, in this case the state of the mind is at issue of petitioner Anderson and Charles Bermant, Anderon's employee and the author of the offending article, as well as the credibility of Anderson's and Bermant's professions of good faith and lack of malice in the publication of the defamatory falsehoods. Far from unadorned speculation, an abundance of circumstances are present from which inferences can be drawn of their actual malice and from which the credibility can be impeached regarding their professions of good faith.[17]

2. The Right to Confront and Cross-Examine Witnesses at Trial is Even More Compelling Where the Moving Party's Own State of Mind (or That of His Agent) are Critical Issues, as in the Instant Case Where the Petitioners Claim Lack of Actual Malice in the Publishing of the False Statements Defaming the Respondents.

The caution against disposition by summary judgment where state of mind or credibility is at issue is particularly compelling where the moving party's own state of mind is the critical element on which consideration of the motion turns. The courts are justifiably reluctant to allow disposition by self-serving declarations without an opportunity for cross-examination

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17. Some of these circumstances include reliance upon an article that had previously been the subject of a defamation action settled to the respondents' satisfaction; reliance upon an unknown source with no care as to the source's reliability; claimed loss of notes bearing upon the preparation of the offending articles; disregard of notice from the magazine's editor that the proposed articles were "ridiculous" and likely libelous; disregard of notice from petitioners that the articles were false and defamatory and distribution without any checking of accuracy of the content. These circumstances are discussed in detail in Section III, *infra*.

before the trier of fact so that the trier of fact may be in a position to adequately judge the demeanor and credibility of the crucial witnesses. Eloquent expression of this principle was made by this Court in disapproving summary judgment upon the affidavits of witnesses allied with or employed by the defendant:

> "* * * the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 408.
>
> This Court has said: "The jury were the judges of the credibility of the witnesses * * * and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel by which a jury are to be guided in determining the weight and credibility of his testimony. . . ." *Aetna Life Insurance Co. v. Ward*, 140 U.S. 76, 88.
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> . . . It may well be that the weight of the evidence would be found on a trial to be with defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight to be given to their opinions is to be determined, after trial, in the regular manner.

Sartor v. Arkansas Natural Gas Corporation, 321 U.S. 620, 628 (1944), *reh. denied*, 322 U.S. 767 (1944).

The authorities offered by petitioner do not in any way, as petitioners suggest, stand for the proposition that genuine issues of defendant's state of mind or the credibility of his assertions do not serve to preclude summary judgment. In *First National*

Bank of Arizona v. Cities Service Co., Inc., 391 U.S. 253 (1968), this Court merely disapproved what had become a *per se* rule against the grant of summary judgment in anti-trust cases, and held that an opposing party may not defeat summary judgment in the absence of "any significant probative evidence tending to support the complaint," *id.*, 391 U.S. at 290. In *Cities Service*, massive uncontradicted documentary evidence supported the defendant's claim of lack of involvement in a conspiracy to restrain trade. Likewise, in *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979), also relied on by petitioners, the Court of Appeals approved summary judgment because, although an anti-trust case, the defendant's subjective state of mind and intent were not at issue. *Id.*, at 1166.

In this case, however, a myriad of circumstances are present indicating the petitioners' reckless disregard for the truth and casting doubt on their professions of good faith. Petitioners earnestly contend that legitimate explanations exist for each of the circumstances found by the Court of Appeals to constitute evidence of petitioners' actual malice, Petitioners' Brief at 30-40, and that therefore they are entitled to summary judgment.

However, the petitioners' argument goes too far, for ". . . even though there may be no dispute about the basic facts, still summary judgment will be inappropriate if the parties disagree on the inferences which may reasonably be drawn from those undisputed facts." *Morrison v. Nissan Co., Ltd., supra*, 601 F.2d at 139. Indeed, on the facts of this case, many of them disputed, it is appropriate for the trier of fact to evaluate the petitioners' good faith or lack thereof "after observation of the demeanor of the witnesses during direct and cross-examination," *id.*, on such matters as their reliance on the mysterious informant Eringer and whether they were unaware that the *True* magazine article upon which they relied so heavily had been the

subject of a successful defamation action.[18] Where facts and inferences are so sharply in dispute, both respondents' constitutional right to jury trial and the interest in an accurate fact-finding process require resolution of the factual issues at trial.

B. Where the State of Mind and Credibility of the Party Seeking Summary Judgment are at Issue, the Procedures for Assessing the Propriety of Summary Judgment Differ From Those for Assessing the Propriety of a Directed Verdict After Receipt of Testimony at Trial.

The petitioners' claim that "the standard for summary judgment under Rule 56 is identical to that for a directed verdict" under Rule 50. Petitioners' Brief at 13-16. Their argument ignores the essence of the difference between summary judgment and directed verdict, recognized by the Court of Appeals, 746 F.2d at 1571, that the court may assess the weight, as opposed to the existence, of evidence only after trial. Remarkably, petitioners cite as authority the Court's decision in *Sartor v. Arkansas Natural Gas Corp., supra,* in which the Court specifically ruled that summary judgment was improper because issues of credibility were present, although the trial court, after assessing the credibility of the witnesses after cross-examination, might at that point determine whether the weight of the evidence justified a directed verdict.

The Courts of Appeals have consistently followed this distinction in the trial court's role in determining motions for summary judgment and motions for directed verdict, particularly where issues of state of mind and credibility are present. In a

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18. The importance of the opportunity for the trier of fact to observe the demeanor of these critical witnesses upon cross-examination is not supplanted by offering deposition transcripts at the summary judgment stage. See, *Cross v. United States,* 336 F.2d 431, 434 (2d Cir. 1964).

recent case, the United States Court of Appeals for the Fourth Circuit has precisely explained the distinction in this context:

> Summary judgment is seldom appropriate in cases in which particular states of mind are decisive elements of claim or defense, because state of mind is so often proved by inferences from circumstantial evidence and by self-serving direct evidence. *Charbonnages de France v. Smith,* 597 F.2d at 414. . . . Summary judgment also is inappropriate if an issue depends upon the credibility of witnesses, because such credibility can best be determined after the trier of fact observes the witnesses' demeanor. *Morrison v. Nissan Motor Co.,* 601 F.2d 139, 141 (4th Cir. 1979). Even in cases where the judge is of the opinion that he will have to direct a verdict for one party or the other on issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented. *Pierce v. Ford Motor Co.,* 190 F.2d at 915.

Magill v. Gulf & Western Industries, 736 F.2d 976, 979 (4th Cir. 1984). Accord, *Panter v. Marshall Field & Co.,* 646 F.2d 271, *282 (7th Cir. 1981), cert. denied,* 454 U.S. 1092[19]; *Morrison v. Nissan Motor Co., Ltd.,* 601 F.2d 139, 147 (4th Cir. 1979)[20];

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19. "Thus to survive summary judgment a party need only *raise* an issue of fact, whereas the test on directed verdict is whether a party has presented sufficient evidence to support a finding in his favor on that contested issue. The directed verdict situation thus presents a higher evidentiary hurdle than the preliminary test of summary judgment."

20. "We might add that, had the district judge made his findings in this case after a trial and after the witness had been subjected to both direct and cross-examination, with an oppor-

Denny v. Seaboard Lacquer, Inc., 487 F.2d 485, 491 (4th Cir. 1973); *Croley v. Matson Navigation Co.*, 434 F.2d 73, 77 (5th Cir. 1970), *reh. denied*, Feb. 26, 1971.[21]

The Court of Appeals thus correctly followed established law in declining to attempt to weigh the evidence in advance of its presentation at trial.

NOTES (*Continued*)

tunity for the judge to observe the demeanor of the witnesses, we would have had no difficulty in concluding that such findings were not clearly erroneous. We conclude solely that, on the record presently made the district court should not have decided the disputed issues in the case by summary judgment."

21. "Knowledge on the part of the company can be proved only by showing the state of mind of its employees. The court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind. Much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue. [citations omitted]

. . . Of course, in holding that the case should go to trial, we do not rule out the possibility of a directed verdict. At the close of the trial, after the parties have presented all their evidence and have been afforded ample opportunity for cross-examination, it may be that there can be only one reasonable inference drawn from the facts. In that case the district court is free to direct a verdict for the proper party."

C. Applying the "Clear and Convincing" Burden of Proof of the Ultimate Issue of Actual Malice at the Summary Judgment Stage Would Impermissibly Deny the Plaintiff the Opportunity to Challenge the Credibility of the Defendant's Self-Serving Assertions of Lack of Malice.

1. The Interest in Avoiding Erroneous Decisions is Not Served by Attempting to Impose the Heightened Burden of Proof at the Summary Judgment Stage.

As part of the constitutional requirements attaching in defamation cases, the element of actual malice in a public figure libel case must be established by the plaintiff at the heightened level of proof with "convincing clarity," *New York Times v. Sullivan, supra,* 376 U.S. at 285-86. The Court, in other contexts, has elucidated the rationale for establishing a constitutionally-based standard of proof:

> The function of the standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship,* 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. Texas, 441 U.S. 418, 423 (1979) (civil commitment of mentally ill). See also, *Colorado v. New Mexico,* 104 S.Ct. 2433, 2438 (1984).

Establishment of the "clear and convincing" burden of proof for public figure defamation cases obviously allocates to the libel plaintiff a greater risk of erroneous judgment than would be born under the ordinary civil "preponderance of the evidence" standard. The heightened burden of proof also re-

flects the importance of the ultimate decision where First Amendment interests are implicated.

However, the importance of the correctness of the decision in a public figure libel case is in no way an argument that the decision should be made summarily without the benefit of the truth-seeking process of a trial.[22] Indeed, the converse is the case. Moreover, as the Court of Appeals recognized, 746 F.2d at 1570-71, application of the heightened burden of proof at the "clear and convincing" level necessarily implies a weighing of the evidence that is inappropriate at the summary judgment stage.[23]

In applying the criminal burden of proof beyond a reasonable doubt in determining whether the prosecution's evidence is sufficient for the case to go to a jury, the United State Court of Appeals for the Second Circuit has noted that the "test must be applied to the totality of the Government's case and not to each element, since . . . any fact may gain color from others. . . ." *United States v. Taylor,* 464 F.2d 240, 244 (2d Cir. 1972). This principle of determining the sufficiency of evidence at the criminal burden of proof beyond a reasonable doubt, as the Court of Appeals correctly ruled, is fully applicable to the determination of sufficiency of evidence at the heightened

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22. See Section II.A, B, and C, *supra.*

23. The Court of Appeals was correct in rejecting a contrary view apparently expressed in *Yiamouyiannis v. Consumers Union,* 619 F.2d 932, 940 (2d Cir. 1980) and *Nader v. de Toledano,* 408 A.2d 31, 50 (D.C.App. 1979), *cert. denied,* 444 U.S. 1078 (1980), and in noting that in those decisions "those courts' analyses of the facts demonstrate that they rested their decisions upon lack of evidence of malice, not upon lack of 'convincing clarity' in that evidence." 746 F.2d at 1571.

burden of convincing clarity required for public figure libel cases.[24]

Moreover, the importance of the correctness of the decision in public figure libel cases underlays the requirement of independent judicial determination of "whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection," *Bose Corp. v. Consumers Union,* 104 S.Ct. 1949, 1965 (1984). Rather than requiring or even authorizing a summary determination on so important a matter, as the petitioners suggest, this Court in *Bose* specifically affirmed the value of development at trial of evidence of the demeanor of witnesses:

> Moreover, Rule 52(a) commands that "due regard" shall be given to the trial judge's opportunity to observe the demeanor of witnesses; the constitutionally based rule of independent review permits this opportunity to be given its due.

Id., 104 S.Ct. at 1959; accord, *Patton v. Yount,* 104 S.Ct. 2885, 2892 (1984).

This Court has consistently recognized "the individual's

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24. "We believe, in short, that application of the 'clear and convincing evidence' constitutional standard in public figure libel cases is similar to application of the 'beyond a reasonable doubt' constitutional standard in criminal cases. There, 'probable cause' is sufficient to take the case to trial, see *Brown v. Department of Justice,* 715 F.2d 662, 667 (D.C.Cir. 1983), and the heightened standard applies only after the government has had an opportunity to present its full case, *United States v. Davis,* 562 F.2d 681, 683-84 (D.C.Cir. 1977) (on motions for acquittal, court must determine whether there is any evidence "upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt)."

746 F.2d at 1570-71.

right to the protection of his own good name," *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 341, and has cautioned that "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues," *id.* at 340. Nothing in the case law developed by this Court indicates that such important issues presented by competing interests should be summarily resolved by the self-serving profession of a libel defendant's good faith, untested by cross-examination before the trier of fact in the trial process of our system of justice—the best system yet devised for determination of the truth.

2. Attempting to Apply the Heightened Burden of Proof at the Summary Judgment Stage Would Violate the Right to Trial by Jury Guaranteed by the Seventh Amendment.

Petitioners, with commendable candor, ultimately acknowledge in their brief that they do not seek application of the settled law of summary judgment but instead a "reconsideration" of this Court's statement in *Hutchinson v. Proxmire, supra,* 443 U.S. at 120 n.9 regarding proof of "actual malice" that would be an unprecedented abrogation of the constitutional right to trial by jury. See Petitioners' Brief at 24-26.

This Court has consistently held that evaluation of credibility and of state of mind, that is at the essence of the subjective test of actual malice, are uniquely issues of fact to be resolved by the jury. "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'." *Poller v. Columbia Broadcasting System, supra,* 368 U.S. at 473. " 'That part of every case [evaluating weight and credibility of testimony], such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and, so long as we have jury trials, they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function.' " *Aetna Life Insurance*

Co. v. Ward, 140 U.S. 76, 88." *Sartor v. Arkansas Natural Gas Corporation, supra*, 321 U.S. at 628.

This Court in *Bose v. Consumers Union, supra*, was careful to state the constitutional duty of independent review of the determination of actual malice is not a substitute for determination by the trier of fact of factual issues, but a reviewing function to determine that " '. . . the judgment does not constitute a forbidden intrusion on the field of free expression'. [citation omitted]." *Id.*, 104 S.Ct. at 1964. This Court has specifically disavowed the establishment of special procedural rules for libel cases, *Calder v. Jones, supra*, 104 S.Ct. at 1488; nothing in the case law developed by this Court indicates or favors a special abrogation of the constitutional right to jury trial.

Respondents Liberty Lobby and Carto have brought their case in the District of Columbia, the headquarters of their activities as well as that of petitioner Jack Anderson. A jury from this venue should decide the factual issues presented, subject to review according to the principles established by this Court.

III. A COURT SHOULD NOT ATTEMPT TO DETERMINE WHETHER A JURY COULD FIND WITH CONVINCING CLARITY THAT THE CHALLENGED STATEMENTS WERE PUBLISHED WITH ACTUAL MALICE ABSENT DIRECT AND CROSS-EXAMINATION OF THE CENTRAL WITNESSES IN THE PRESENCE OF THE TRIER OF THE FACTS.

The gravamen of the petitioners' brief is, simply put, that the author of the article has come forward since its publication and frankly stated his "belief that each of the challenged passages was true."[25]

This, hold the petitioners, is basically dispositive of the matter at hand. The respondents argue that the author Bermant relied entirely upon classically unreliable sources for a number

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25. Brief for Petitioners, p.27.

of challenged assertions and that the trier of fact who witnessed the demeanor of the author as he attempted to rationalize his pure of heart proclamation might find it to be without apparent credibility. Since cross-examination is the engine which propels our system of justice, in this instance the evidence abounds that the author, Mr. Anderson and Mr. Spear would be hard put to support a declaration of lack of actual malice, so gossamer is the foundation for their most audacious assertions of fact.

The respondents have neither the duty nor the desire to seek to establish the principle that summary judgment is inappropriate relief in all defamation cases. The respondents assert instead that the facts in this case mandate a jury trial and that should, in spite of the almost remarkable factual showing herein, the Court determine otherwise, it would indeed be challenging to conjure up a set of circumstances in which a trial might be required.

A. The Petitioners Relied Exclusively Upon Obviously Unreliable Sources in Publishing a Number of Defamatory and Challenged Assertions.

A libel defendant may be shown to have acted with reckless disregard in publishing defamatory statements based on sources, where he had "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson, supra,* 390 U.S. at 731; *Carey v. Hume,* 492 F.2d 631, 637 (D.C. Cir.), *cert. dismissed,* 417 U.S. 938 (1974). Two of the petitioners' principal sources, the Spear/Trento *True* magazine article and one Robert Eringer, were so discredited or unworthy of trust that the petitioners' exclusive reliance upon them for some of the challenged assertions created at the least more than a suspicion of actual malice and might well warrant an inference of actual malice by a reasonable jury. The trier of fact in reaching an appropriate determination would be required to assess the credibility of the petitioners rather than to rely entirely upon their exposition of good faith. A jury is no more required to accept the word of a defendant in a defamation action

as to his state of mind than the government or a jury is required to take the word of a criminal defendant that he lacked the requisite intent for a criminal conviction.

1. The Spear/Trento *True* Magazine Article.

Charles Bermant, the employee of *The Investigator* who authored the articles containing the multiple defamations complained of, relied upon as a principle source an article regarding plaintiffs Liberty Lobby and Willis Carto which appeared in *True* magazine in 1969. It was entitled "How Nazi Nut Power Has Invaded Capitol Hill," and was written by Joseph Spear and Joseph Trento. In March 1970 Willis Carto, a petitioner in this case, filed a libel action against Spear, Trento, and Fawcett Publications, Inc., the publishers of *True*, based on the false and defamatory assertions contained in the article. (J.A. 100 [Carto Aff. ¶ 7].) The lawsuit was settled in 1970, with a payment by the defendants to Carto of a sum of money and the publication in *True* of a compensatory article correcting the previously published defamations. *Id.* at 2.[26]

A decade later, Spear, then Managing Editor of *The Investigator*, a petitioner in this case, assigned Bermant, a newly hired employee, to write essentially the same story regarding

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26. The petitioners assert that the article was not compensatory and that "in no sense can be regarded as a retraction of anything in the prior article" Brief p.39 footnote 32. The powerful Nazi Nut who invaded Capitol Hill was assertedly Willis Carto according to Joseph Spear and Joseph Trento. The subsequent article was entitled "*True* Talks to the People's Lobby" and began with the endorsement by Colonel Curtis B. Dall, the son-in-law of President Franklin Delano Roosevelt, that "Liberty Lobby was envisioned around 1955 by Willis A. Carto, a great American patriot." The second article was as extravagant as the first but saw the matter from an entirely different and contradictory perspective. From a Nazi Nut the respondent was transformed into a visionary and great American patriot. Perhaps in some sense it might be regarded as a retraction.

Liberty Lobby and Carto, and gave him two drafts containing statements similar to those previously published in *True*. Bermant then used the earlier Spear/Trento *True* article as his most important source, and relied upon allegations it contained more often than he relied upon all other sources combined.[27]

Bermant, working under Spear's supervision, relied upon *True*, testified that he was not told that *True* had in essence published a retraction, was not informed that Spear and *True* had been sued for libel, and was not told that *True* had paid to Carto a sum of money in settlement of the law suit for defamation.

While it might strain credulity to accept the Bermant deposition testimony that he did not know that the article he relied upon more heavily than all other published articles combined, which was written by his supervisor, was the subject of a successful defamation action, there is no direct evidence to contradict his assertion. The evidence would surely permit a reasonable jury to consider the inference that the defendants used Bermant to, in effect, "launder" sources known to them to be unreliable and that they did so without disclosing to Bermant the single most important fact about the *True* article—it was the basis of an earlier libel suit in which the defendants felt constrained to pay for the libel they had published and to publish in response an article about the plaintiffs written to the specifications of the plaintiffs as compensation for the defamation.

The presence in the record of the evidence regarding the *True* article as a source for the defendants' publishing of defamatory statements alone warrants a jury trial. The petitioners assert that "[N]o reasonable inference can be drawn that Spear had notice of the *True* litigation" (p.38 footnote 31). The Court of Appeals concluded that the fact that the *True* article "was the subject of a prior defamation action which was settled

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27. An evaluation of the appendix to his affidavit submitted by Bermant reveals that he relied upon 38 assertions in *True*.

to Carto's satisfaction [was] a fact likely known to Bermant's editors, if not Bermant."

Indeed it seems quite unlikely that the managing editor (Spear) of a publication entitled *The Investigator* was so poor a journalist and "investigator" that he did not know the consequences suffered by *True*, his employer for having published his defamatory article.

The Court of Appeals found that "a jury could reasonably conclude that defamatory statements based wholly on the *True* article were made with actual malice." (746 F.2d at 1578.) Clearly the respondent is entitled to submit this claim so that the trier of fact may assess the striking allegations of Bermant and Spear as to their innocent ignorance.

In this regard the Court of Appeals held:

> Whether the particular statements relied on were false and whether the appellees were actually aware of that falsity are matters for a jury to determine. Allegation 19, the illustration suggesting that Carto emulated Hitler, and allegation 29, that Carto joined the singing of "Hitler's 'Horst Wessel Lied' " and delivered a speech in an attempt to emulate Hitler's style and charisma, were based solely on the *True* article. There is no other evidence that Carto emulates Hitler in appearance or in action, allegations the jury could find to be defamatory.

(746 F.2d at 1578).

2. Robert Eringer.

One of the more curious and egregious libels in the articles in *The Investigator*, complained of at paragraph XVII of the Complaint, is the assertion that "Carto often observes interviews of prospective employees through a mirror," accompanied by a drawing of a Hitleresque person, allegedly Carto,

spying by looking through a one-way mirror.[28] (J.A. 10 [Complaint, ¶ XVII, XIX].)

Bermant, in the appendix to his affidavit in support of the motion for summary judgment, at pages 15 and 16, listed one Robert Eringer as the sole source for the false statement and drawing, as well as the sole source for a number of other libelous statements complained of.

In his deposition, Bermant, in describing the extent of his contacts with Eringer and his knowledge of Eringer as a source, stated that before publication of the article he had never met Eringer, who he believed resided in London. Bermant deposition, p. 70. He related that Eringer in a telephone call had offered to send a draft article regarding Liberty Lobby and had done so. Bermant stated, however, that the draft Eringer sent had been lost, probably "thrown away." Above all, Bermant admitted that Eringer never gave him any indication as to his sources for the now discarded draft which nevertheless became a principal source for Bermant. When he was deposed Bermant was asked if he recalled any particular information given to him by Eringer which he used in the article. Bermant replied "there was quite a bit."[29]

Anderson also testified about the mysterious Mr. Eringer. He seemed to know even less about him although Eringer was the exclusive source for five challenged assertions.

At his deposition Anderson testified as follows:

> Q. Who is Robert Eringer?
>
> A. I don't know. He has been a freelance writer, I presume.
>
> Q. Had you ever had any other contact with him?
>
> A. The only reason I remember anything at all is because you say that we paid him. If we paid him, then he

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28. In his affidavit of October 9, 1982, plaintiff Carto attests that, "I have never made use of a one-way mirror for any purpose." (J.A. 101 [Carto Aff. ¶ 6].)

29. (J.A. 262 [Bermant Dep. Tr.].)

would have been a freelance writer. There would have been no other reason to pay him.

It does stir my memory a little. It seems to me we did pay a freelance writer who made the original proposal.

Q. But to get back to my question to be sure I heard the answer, did you ever have any previous contact with Mr. Eringer?

A. I don't even know him.

Q. So you can contribute nothing more about Mr. Eringer other —

A. Nothing whatsoever. I may have talked to him during this period. I probably would have authorized the payment which you say I made.

I have a vague recollection that some freelancer did propose this article and I paid him for his idea, and the research that he had done.

Q. Did you have any reason to believe that this individual was reliable?

A. It wouldn't have mattered. The decision was to go ahead with his idea. We did not intend to use his material.

Q. Do you recall whether his idea would have involved the articles which have appeared in the Magazine about both Mr. Yockey and Mr. Carto or would his idea have referred to only Mr. Carto?

A. I have no idea.

As I say, I didn't even remember it until now. My memory continues to be quite vague of it.[30]

Surely for a trier of fact Anderson's testimony as well as his demeanor, which appears even from a reading of the printed page to manifest at the least a studied indifference and perhaps even a reckless disregard for the truth as well as perhaps arrogant disdain for judicial accountability for his false utterances, would have been illuminating.

---

30. (J.A. 185 [Anderson Dep. Tr.].)

The contrast between Anderson's testimony and Bermant's testimony regarding exclusive reliance upon Eringer as a source might well, when assessed by a trier of the fact, influence the resolution as to the credibility of either or both of these central witnesses.

To this the petitioners respond:

> Two additional concerns raised by the Court of Appeals deserve only brief mention. Although the court stated that "Anderson admits that he did not care whether Eringer was reliable." 746 F.2d at 1579, this statement distorts Anderson's testimony[27] and improperly relies on his supposed "admission."
>
> 27. Anderson never testified that he didn't care whether Eringer was reliable. His testimony was that his own belief about Eringer's reliability "wouldn't have mattered," since he was relying on *Bermant's* work and not that of Eringer or any other individual source. (J.A. 185, 194 [Anderson Dep. Tr. 51, 67].)

The Court of Appeals did not "distort" Anderson's testimony. Anderson testified that Eringer's reliability "wouldn't have mattered" explaining not that he was relying upon Bermant's work but rather that *The Investigator* did not intend to use Eringer's material.

The Court of Appeals, in finding that those allegations which were apparently based exclusively upon Eringer's assertions should have been presented to the jury, held:

> Moreover, Bermant's dealings with Eringer display a much lesser degree of care, despite the scurrilous allegations for which he is the sole source. Bermant not only did not inquire how Eringer came to know these details of Carto's operations; he never even looked the unknown Eringer in the eye until after the story was published, but spoke to him only once over the telephone. Anderson admits that he did not care whether Eringer was reliable. These actions came

close to the hypothetical case of actual malice the Supreme Court described in *St. Amant*: a story "based wholly on an unverified anonymous telephone call." 390 U.S. at 732. Eringer was identified by name, but he was in all other respects unknown to the appellees. These allegations, which defendants claim were based solely on Eringer's assertions, should have gone to the jury.

746 F.2d at 1578-79.

While the telephone call was in this instance not truly anonymous[31] as was the apocryphal telephone call described by the Court in *St. Amant* five allegations were based "wholly" upon it and all were "unverified." Thus life again imitated art and Anderson, fictional hypothesis.

B. The Petitioners Published the Defamatory Article and Drawings Despite Having Received Specific Notice That They Were Libelous and Despite the Beliefs Held by the Editor of *The Investigator* That They Might be Libelous.

On August 28, 1981, before the October 1981 issue of *The Investigator* had been released to the public, the plaintiffs delivered to the publisher of *The Investigator*, Jack Anderson, a formal notification that the above-described defamatory matter was libelous, pointing out in detail the false statements contained in the proposed publication, and demanding that the October 1981 issue of *The Investigator* not be released to the public while it included the defamatory matter concerning the plaintiffs. The plaintiffs received no reply to their notification, and the defendants subsequently released the October 1981 issue of *The Investigator*, containing the above-described defamatory matter concerning plaintiffs, to the public.

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31. Bermant testified that Eringer did use a different name for a different story and the record is barren as to which name, if either, is the correct one (J.A. 262 [Bermant Dep. Tr.].)

(J.A. 10 [Complaint ¶ 20].)

In paragraph numbered XIX of the complaint the plaintiffs claimed as false and defamatory, the:

> Illustration depicting man bearing a strong resemblance to Adolf Hitler, with Hitlerian moustache and right hand raised in the unmistakeable suggestion of a Nazi salute, caption "Carto, whose speeches were once a staple of ultra-right gatherings, no longer speaks in public."

The only source offered by Bermant for the statement and drawing is the *True* magazine article discussed above. William McGaw, the editor of *The Investigator*, in his affidavit submitted by plaintiffs in opposition to summary judgment, revealed that when he first saw the drawing in question,

> I called up *The Investigator* art director, Bernie Springsteel, who was in New York, and said, "Bernie, that's giving the wrong impression. You'd think this was Hitler. You've got Hitleresque features and you've got the name Carto underneath." I told the art director, "That could be libelous. You'd better get that off there."

(J.A. 92 [McGaw Aff. ¶ 17].)

In this instance the defendants were given actual notice by their own editor prior to publication of the possible libelous nature of this statement and drawing, and yet proceeded to publication deliberately disregarding the warning they had received.

Indeed, McGaw stated in his affidavit that he had told defendant Anderson that the articles were "ridiculous" and "terrible," (J.S. 92 [McGaw Aff. ¶ 11]), as well as possibly libelous, and that he objected to their publication (J.A. 92 [McGaw Aff. ¶ 19]). McGaw related that Anderson told him that they were proceeding nevertheless to publish the articles, stating as the reason:

> You know when I addressed a meeting of magazine distributors in New York, I noticed they were virtually all

> Jewish. And really the reason I am running these articles about Yockey and Carto is so that they'll be favorable toward us and give us a prominent display on newsstands and supermarkets.

(J.A. 92 [McGaw Aff. ¶ 15].)

Publication of the libelous statement in this article, after having received specific notification from the editor of the libelous character, surely constitutes evidence of subjective awareness of probable falsity, requiring that the case go to a jury for resolution.

C. Had the Court Adapted the "Clear and Convincing" Standard of Proof Sought by the Petitioners at the Summary Judgment Stage the Case Should Have Nevertheless Been Submitted to Jury Trial.

The assertion by the petitioners that no reasonable jury could, by applying any standard, find for the respondents, after the Court of Appeals had unanimously found the converse to be true reflects less upon the evidence than upon the perception and judgment of the petitioners. Indeed even the allegations which the petitioner has submitted to this Court (improperly adding here to the record[32] while improperly subtracting there

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32. In footnote 31 of the Petitioners' Brief which appears on page 38 the petitioners make several assertions regarding Joseph Spear which are nowhere to be found in the record of this case and which were not submitted to the Court of Appeals. The allegations contained in the footnote do not appear in the Joint Appendix and are about matters which allegedly occurred even before the article, which is the subject matter of this law suit, was published. Reference to these events and the filing of a supporting document with the Office of the Clerk of this Court is an attempt to place before this Court matters which were not before the Court of Appeals.

from the record") constitute the basis for jury consideration.

Although the Court of Appeals discussed in detail the impropriety of using the clear and convincing standard in deciding a motion for summary judgment, it did not hold that none of the respondents' evidence met the standard. Indeed, the District Court, in its Opinion, referred only to the petitioners' allegations of racism and anti-Semitism, and never even mentioned any of the nine allegations which the Court of Appeals said that a jury could reasonably conclude were defamatory, false, and made with actual malice. (Appendix to Petition, 66-a, 746 F.2d 1563.) The Opinion of the Court of Appeals can as well as not be interpreted to mean that the nine allegations left standing rose to the level of clear and convincing proof.

The following factual allegations were listed by the Court of Appeals as those a jury could reasonably find false, defamatory, and made with actual malice:

(1) Willis Carto, Liberty Lobby's founder/treasurer, owns the Government Educational Foundation (GEF), which owns the building originally bought with money contributed by Liberty Lobby's members and which now charges Liberty Lobby $6,000 a month rent for the building.

This allegation charges Liberty Lobby's founder and treasurer with fraud and with making personal profit by means of a company supposedly owned by him charging Liberty Lobby exorbitant rent. Bermant relied solely on the discredited source, Eringer, for this falsehood, except for the bare statement that GEF is Liberty Lobby's landlord.

The petitioners' claim tnat this and the other false state-

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33. Although the petitioners concede that a subsequent article was published by *True* (footnote 32, page 39, Petitioners' Brief) they deny that it was a retraction. This matter is discussed in this brief at Section II, *infra*. The petitioners, however, fail to state that the record in this case reveals that the defamation action was settled was settled to Carto's satisfaction and that a sum of money was paid to Carto and Liberty Lobby by *True* (J.A. 101 [Carto Aff. ¶ 8]).

ments listed in this section are "details in these articles that lent further color" to the overall picture of racism, anti-Semitism, and the like (Petitioner's Brief, p.29), is not supported by the evidence. The "details" are not details, but instead are approximately equal in importance and defamatory impact with the other allegations. The "details" neither "lend further color" to, nor "illustrate" the "larger picture" (Brief for Petitioners, p.30); the various defamatory statements deal with unrelated subjects, stand on their own and neither support nor illustrate the other allegations.

(2) Willis Carto organized and promoted a group whose aim was the forced deportation of all blacks to Africa.

There was no support for this false statement in any of Bermant's sources. On the contrary, a source known to respondents spoke of voluntary repatriation, not forced deportation. A jury could scarcely avoid the conclusion that the respondents wilfully and maliciously chose the word "deportation" and entirely from their own imagination added the word "forced" in order to damage respondents.

(3) Illustration of Willis Carto as Adolf Hitler (caption). A drawing of Willis Carto with Hitlerian features and moustache, arm raised in suggestion of a Nazi salute. None of respondents' sources ever stated or implied that Carto looked like Hitler, wore a moustache, or used the Nazi salute. The illustration is a malicious invention. The editor of the respondents' magazine, *The Investigator,* William McGaw, stated prior to the article's publication, ". . . that's giving the wrong impression. You'd think this was Hitler. You've got Hitleresque features and the name Carto underneath. This could be libelous. You'd better get that off there." (Joint Appendix, 95.)

It is difficult, given these circumstances, to conclude that the petitioners did not entertain doubts as to the defamatory character of their assertions. The willingness to proceed with the drawing, like the thirteenth stroke of a clock, casts discredit as well upon all that had gone before and all that was to follow.

(4) Willis Carto joined in singing "Hitler's 'Horst Wessel

Lied' " and delivered a speech in an attempt to emulate Hitler's style and charisma.

The original and uncorroborated source of this false statement is the discredited *True* magazine article. The Court of Appeals was correct in holding that a jury should determine the falsity of the statement and the respondents' awareness of its falsity.

(5) Willis Carto conducts his business by way of conference calls from a public telephone.

This statement falsely suggests that Carto conducts all of his business from public telephones in order to conceal some criminal activity or because he is irrational. It certainly goes beyond the mere implication that he likes privacy, as argued by the petitioners.

Eringer was the sole source of this allegation.

(6) Carto supported G. Gordon Liddy's congressional campaign in New York.

When the petitioner's article was published, Mr. Liddy's reputation had been harmed by his conviction of a felony. The sole source of the false and damaging allegation was Eringer.

(7) Carto secretly observes employees through a one-way mirror.

This false allegation is an invention attributed exclusively to Eringer.

(8) Illustration of Carto secretly observing employees through a one-way mirror.

The petitioners sought to heighten the impact of the false allegation made exclusively by Eringer and did so by publishing a drawing of a Hitler-like Carto peering through a one-way mirror to observe prospective employees.

(9) Claim that a lead story in The SPOTLIGHT was a total hoax.

Eringer was the sole source of this false allegation. No other sources bolster these allegations of deliberate journalistic deception.

Each separate act of defamation set forth above is an in-

dependent and false allegation made with reckless disregard for the truth or with knowledge that the assertion was untrue. Thus each act of defamation would have met the heightened standard of clear and convincing evidence had the Court of Appeals improperly utilized such a measure.

The evidence adduced by the respondents in resistance to petitioners' motion for summary judgment is far weightier than that slight imbalance of scales required by the "preponderance of the evidence" standard of proof. The ultimate factual question, the constitutional question, must therefore be answered in respondents' favor: They have met their burden of showing by clear and convincing evidence that the petitioners published defamatory statements about them with actual malice.

CONCLUSION

In eighteenth century England the rule was well established in criminal cases, and not always confined to criminal cases, that "the greater the truth the greater the libel." Lord Mansfield was credited with the maxim and his authorship of the doctrine was celebrated by Robert Burns in "The Reproof":

> Dost not know that old Mansfield
> Who writes like the Bible,
> Says the more 'tis a truth, sir,
> The more 'tis a libel?

Andrew Hamilton in the landmark *Zenger* case in 1735 challenged that concept as Alexander Hamilton did for the defense in *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804).

While truth was held to be no defense to a charge of libel in the Court of the Star Chamber in 1605, two centuries later in New York State that concept was by and large abandoned. Hamilton's argument that the truth be essential in determining libel was so powerful that his call for the privilege "to publish the truth," widely reprinted in the Colonies and England, was

one of the factors which led to the First Amendment provisions concerning freedom of speech and freedom of the press.

In the instant matter in the name of the First Amendment the petitioners seek the right to publish falsehoods with almost absolute immunity from responsibility, and in that plea they are joined by other representatives of the news media. They urge that the First Amendment be distorted to afford to them this extraordinary protection. Yet they would deny to those among us who would speak in non-conforming tones the right to do so except at the peril of the destruction of reputaton through defamation which may not be redressed through our legal system. They would deny as well the right guaranteed by the Seventh Amendment to a trial by jury. They assert that a proliferation of defamation cases successfully concluded by plaintiffs through the utilization of our jury system may best be halted by the establishment of procedural as well as substantive obstacles to be fashioned by the Court.

Perhaps a more moderate approach and one more in keeping with our traditional concepts of law would be to urge those in the business of selling newspapers, magazines and air time to take more care in the preparation of their stories so that they cease publishing false and defamatory remarks. After all very few would urge that growing problems of increasing criminal conduct be met by the repeal of all penal statutes.

In this matter the Court of Appeals correctly concluded that the standard for evaluating a limited purpose public figure libel case does not require that upon a motion for summary judgment the court must conclude that a reasonable jury not only could (on the basis of the facts taken in the light most favorable to the plaintiff) find the existence of actual malice, but could find that it had been established with "convincing clarity."

The Court correctly resisted the effort to impose increased proof requirement at that stage for it would change the threshold summary judgment inquiry from a search for minimum of facts supporting the plaintiff's case to an evalua-

tion of the weight of those facts. Particularly is that so when the state of mind of central witnesses may best be discerned by the trier of the facts who is given the opportunity to assess the credibility of the witness through the witness demeanor during testimony.

For the reasons described above, we respectfully request that the order of the Court of Appeals be affirmed.

August 17, 1985

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No. 84-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

—against—

LIBERTY LOBBY, INC., and WILLIS A. CARTO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION OF AMERICAN PUBLISHERS, CBS INC., CHICAGO TRIBUNE COMPANY, DOW JONES & COMPANY, INC., THE HEARST CORPORATION, THE MAGAZINE PUBLISHERS ASSOCIATION, THE MIAMI HERALD PUBLISHING COMPANY, NATIONAL BROADCASTING COMPANY, INC., NEWSWEEK, INC., THE NEW YORK TIMES COMPANY, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS/ SIGMA DELTA CHI, TIME, INC., TIMES MIRROR COMPANY, AND WESTINGHOUSE BROADCASTING AND CABLE, INC. IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1602

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,

Petitioners,

—against—

LIBERTY LOBBY, INC., and WILLIS A. CARTO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATION OF AMERICAN PUBLISHERS, CBS INC., CHICAGO TRIBUNE COMPANY, DOW JONES & COMPANY, INC., THE HEARST CORPORATION, THE MAGAZINE PUBLISHERS ASSOCIATION, THE MIAMI HERALD PUBLISHING COMPANY, NATIONAL BROADCASTING COMPANY, INC., NEWSWEEK, INC., THE NEW YORK TIMES COMPANY, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS/ SIGMA DELTA CHI, TIME, INC., TIMES MIRROR COMPANY, AND WESTINGHOUSE BROADCASTING AND CABLE, INC. IN SUPPORT OF PETITIONERS

This brief is respectfully submitted, with the consent of all parties, pursuant to Rule 36 of the Rules of this Court, urging reversal of the decision below of the United States Court of Appeals for the District of Columbia Circuit, on the grounds that (1) constitutionally mandated legal standards established to protect freedom of expression must apply at the summary judgment stage as they do at all other stages of a libel action, and (2) any implication of the decision below that summary judgment is a disfavored remedy in actual malice libel cases should be rejected by this Court.

INTEREST OF AMICI

Amici include publishers of newspapers, magazines and books, and owners of major radio and television networks, involved in communicating news, information, and opinion to the American public, and organizations of persons or entities involved in such communication. Each of the *amici* is more fully described in the Appendix annexed hereto. They or their constituents are frequent targets of libel actions brought by public figures and public officials.

The question presented in this case is a matter of continuing and critical concern to *amici*. They or their constituents will be directly affected by this Court's resolution of the question now before it respecting the proper procedures and standards by which trial judges will determine whether public figure and public official libel cases may be disposed of on summary judgment.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is now well-settled that, in a libel case brought by a public figure or public official, the plaintiff must prove actual malice with "convincing clarity" to the satisfaction of both the trier of fact and courts reviewing the verdict. This case raises the question whether the "convincing clarity" standard must be *disregarded* when the defendant moves for summary judgment,

the point at which the district court must determine whether the plaintiff has sufficient evidence to require a trial. The court below held in the affirmative. The perverse result is to require trials even in cases where a district judge concludes that, if granted a trial, the plaintiff cannot possibly meet the applicable burden of proof.

Amici believe that this question should be resolved otherwise, in accordance with the vast majority of precedent on the issue. It requires no special rule crafted to protect speech or the press to conclude, on the basis of logic, precedent, the structure of the Federal Rules, and practical considerations, that a court engaged in the determination of whether a plaintiff deserves a trial must consider what it is that the plaintiff must establish to obtain a verdict. In all areas where the law supplies an elevated standard of proof, courts apply that standard in deciding motions for summary judgment. In a public figure libel case, the plaintiff must prove actual malice with "clear and convincing" evidence, a high standard carefully established to safeguard free speech from the punitive consequences of damages erroneously imposed by the imperfect fact-finding of civil litigation. Each of the arguments advanced by the Court of Appeals for disregarding plaintiff's "clear and convincing" burden at the summary judgment stage is fundamentally flawed; in fact the concerns discussed by that court, properly conceived, support a contrary result. The vast majority of decisions on this issue correctly reject the result reached on this issue below. (Point One).

If the Court of Appeals was suggesting that summary judgment is an inappropriate or disfavored remedy in actual malice libel cases, this implication should be rejected. Commonly, after discovery has been completed, it is clear that the plaintiff's burden of proof simply cannot be met. Such a case should, as a matter of sound judicial practice, be dismissed. Moreover, because freedom of speech is uniquely susceptible to the inhibiting effect of burdensome, punitive litigation, courts should be alert to avoid sending insufficiently supported libel cases to trial. Actual malice is a purposefully difficult standard to meet, and its proper, firm application to summary judgment motions will frequently result in pretrial dismissal. (Point Two).

ARGUMENT

POINT ONE

THE CONSTITUTIONAL REQUIREMENT THAT EVIDENCE OF ACTUAL MALICE IN A PUBLIC FIGURE LIBEL CASE BE "CLEAR AND CONVINCING" CANNOT BE DISREGARDED FOR PURPOSES OF A DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. The "Clear and Convincing" Standard in Defamation Cases Protects Important First Amendment Values

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), the Court held that the common law rule of libel "compelling the critic of official conduct to guarantee the truth of all his factual assertions, and to do so on pain of libel judgments virtually unlimited in amount," was unconstitutional because it would inevitably lead to self-censorship of speech protected by the First and Fourteenth Amendments. The Court recognized that the test of actual malice—imposing on plaintiff the burden of proving with convincing clarity that the speech was known to be false or uttered in reckless disregard of the truth—is necessary precisely because of the imperfect nature of fact-finding in ordinary civil litigation. The basis of decision, then, was not to protect false speech, but to insulate speech believed by the author to be true from the vagaries and expense of courtroom adjudication. The Court held:

> Under . . . a rule [where truth alone is a defense], would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall*, . . . 357 U.S. [513] at 526 [(1958)]. The rule thus dampens the vigor and limits the variety of public debate.

> It is inconsistent with the First and Fourteenth Amendments.

376 U.S. at 279.

The "convincing clarity" (or "clear and convincing") requirement, one "which the constitutional standard demands," was invoked as an integral part of the actual malice test. 376 U.S. at 286. It has since been applied consistently by this Court in libel cases involving public officials or public figures, and was strongly reaffirmed last year in *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S.Ct. 1949, 1965 (1984).

The requirement of an elevated standard of proof as a constitutional imperative is, of course, not limited to First Amendment values. This Court has on occasion, under the command of the Fifth and Fourteenth Amendments, imposed elevated standards of proof upon proceedings jeopardizing other fundamental human rights. For examp[illegible] "clear and convincing" standard of proof is required by [illegible]rteenth Amendment in civil proceedings brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital. *Addington v. Texas*, 441 U.S. 418 (1979). The Court there noted that even though it may be argued whether "particular standard-of-proof catchwords" make a great difference in particular cases,[1] adopting a standard of proof is more than "an empty semantic exercise." *Id.* at 425. The elevated standard is in all cases an expression of the value placed by society on the interest at risk in the litigation. Accordingly, elevated standards are required in proceedings brought by the state to terminate the rights of parents in their natural child upon a finding of permanent neglect,

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1 In 1980, one of the counsel for *amici* was of the view that, although ready availability of summary judgment for defendants in libel suits was crucial to the vindication of principles enunciated in *New York Times Co. v. Sullivan*, *supra*, employment of the "convincing clarity" standard at that stage of the proceedings would probably have little impact on decisions in particular cases. R. Sack, *Libel, Slander, and Related Problems*, 549-50, 573-75 (1980). The decisional law since then, much of it cited in footnote 15 *infra*, in the wake of the *Hutchinson* footnote discussed in Part Two below, has convinced him that the effect has been substantially greater than was then supposed.

Santosky v. Kramer, 455 U. S. 745 (1982), and in denaturalization, expatriation and deportation proceedings, *Woodby v. Immigration and Naturalization Service*, 385 U. S. 276 (1966).[2]

It is a truism that in judicial proceedings "the factfinder cannot acquire unassailably accurate knowledge of what happened . . . [and] will sometimes, despite his best efforts, be wrong in his factual conclusions." *In Re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). The adoption of the "convincing clarity" standard in particular legal circumstances is a recognition that erroneous findings for plaintiffs in those cases is far more dangerous than erroneous findings for defendants.

The Court in *New York Times* thus fashioned the "clear and convincing" standard as a bulwark against jury punishment of speech that runs against the popular grain—*i.e.*, speech that is perceived at the moment to be "false." The issue is whether this vital protection is to take hold only when the speaker has been subjected to a full trial, and perhaps a verdict, or is to be preserved as a meaningful standard at all stages of litigation.

B. Courts Properly Consider Heightened Standards of Proof in Deciding Summary Judgment Motions

1. *A Comparison of Directed Verdict and Summary Judgment Motions Establishes that the "Clear and Convincing" Standard Must Be Employed in Deciding Both*

The "clear and convincing" evidence standard forms an integral element of the independent appellate review of libel judgments required by the First Amendment. *Bose Corp. v. Consumers Union of the United States, Inc.*, *supra*. Before that, of course, it must be the subject of a full and adequate charge to the jury. *New York Times Co. v. Sullivan*, *supra*. As

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2 As noted in *Woodby*, the clear and convincing standard of proof "is no stranger to the civil law," having been applied traditionally at common law in a variety of cases, such as civil fraud, adultery, illegitimacy of a child born in wedlock, lost wills, and oral contracts to make bequests. *Woodby v. Immigration & Naturalization Service*, 385 U. S. 276, 285 n.18 (1966).

recognized by the Court of Appeals below, the elevated standard is also critical to the decision of the trial court in ruling upon a motion for directed verdict under Rule 50 of the Federal Rules of Civil Procedure. Slip op. at 14. *See also Guam Federation of Teachers v. Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974); *Casano v. WDSU-TV, Inc.*, 464 F.2d 3 (5th Cir. 1972). The Court of Appeals below held nonetheless that the standard of proof was irrelevant to consideration of a dispositive summary judgment motion before the conduct of the trial. It is that holding which conflicts with constitutionally mandated protections described in Section A above, conflicts with the practices of federal courts in ruling upon motions for summary judgment in cases involving elevated standards of proof (including actual malice defamation cases), and conflicts with a rational and symmetrical application of the federal rules to achieve their manifest purposes.

Rule 50 provides that at the close of evidence offered by an opponent, a party may move for a directed verdict on the ground that his opponent has failed to make his case as a matter of law. The rule does not specify the standard to be applied by the court in ruling on the motion, but this Court has held that a directed verdict is appropriate "[w]hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict . . . ." *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943). The motion for a directed verdict is described as serving two purposes: first, the saving of "time and trouble involved in a lengthy jury determination" of a meritless case. Second, "[i]t is something more. It is a method for protecting neutral principles of law from powerful forces outside the scope of law—passion and prejudice." 5A J. Moore, *Moore's Federal Practice* (hereinafter Moore), ¶ 50.02[1], 50-19 (2d ed. 1985), *quoting Rutherford v. Illinois C.R. Co.*, 278 F.2d 310, 312 (5th Cir.), *cert. denied*, 364 U.S. 922 (1960).

The conservation of judicial resources effected by the directed verdict motion is limited, coming as it does after the presentation of at least the plaintiff's case. The protection it

affords against jury passion and prejudice is, however, particularly pertinent in defamation cases, for the Court has often recognized that unfettered jury discretion to punish unpopular views is a direct threat to freedom of expression. *Bose Corp. v. Consumers Union of the United States, Inc.*, *supra*, 104 S. Ct. at 1965; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971); *Rosenblatt v. Baer*, 383 U.S. 75, 88 n.15 (1966); *Herndon v. Lowry*, 301 U.S. 242, 261-63 (1937).

Rule 56 specifies that a motion for summary judgment may be brought before trial and granted upon the basis of evidence demonstrating that there is no "genuine issue" as to any "material fact," so that the moving party is entitled to "judgment as a matter of law." The twin elements that the contested fact be material and that the dispute be genuine cause the motion for summary judgment to be the functional equivalent of a motion for directed verdict.[3] In other words, "if it is clear that a verdict would be directed for the movant on the evidence presented at the hearing on the motion for summary judgment, the motion for summary judgment may properly be granted." 6 Moore, ¶ 56.15[3] at p. 56-479; 10A C. Wright & A. Miller, *Federal Practice & Procedure* (hereinafter "Wright & Miller") § 2725, pp. 103-04, *citing Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, 624 (1944). Accordingly, the test is also essentially the same: whether the evidence is such that reasonable jurors might differ as to its significance. 10A Wright & Miller, § 2725, pp. 106-09. The same purposes are also to be served as are served by a directed verdict, except that they are served in a more effective manner. The saving of judicial resources and expense to the litigants is greater because the motion occurs before the jury is empaneled and witness after witness takes the stand. Similarly, the risk of a result induced by passion and prejudice evaporates before the defendant is

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3 The differences between a motion for summary judgment and a motion for directed verdict relate almost exclusively to the time at which the adjudication is made and the fact that the evidence is by way of affidavit rather than live witnesses. *Agosto v. Immigration & Naturalization Service*, 436 U.S. 748, 770-71 n. 8 (1978) (Powell, J., dissenting).

driven by the prospect of trial litigation to monetary or other concessions.

Reading the two rules together, it becomes clear that, once the parties have been given an adequate opportunity to marshal evidence, the mission of the court is to determine at the earliest possible stage whether there is a case for the jury, *i.e.*, whether reasonable jurors could find for the opponent of the motion for judgment. In that calculus, the burden facing the opponent at trial is of obvious significance. Careful balancing of the rights of the litigants suggests that on summary judgment it is the burden of the moving party, whether or not bearing the burden of proof, to present to the court evidence establishing that party's right to judgment. It is then the responsibility of the opposing party to present sufficient evidence to enable that party to prevail before a jury of reasonable individuals. *See Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 160-61 (1970); *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289 (1968). And if the opponent has the ultimate burden of persuasion, and particularly an enhanced burden of persuasion, that evidence must be such that reasonable jurors could find that burden to have been met. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L. J. 745, 747 (1974); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984) ("When the moving party does not have the burden of proof on the issue, he need only show that the opponent cannot sustain his burden at trial.")[4]

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4 It has been suggested that the ultimate burden of proof should have an even stronger influence upon the outcome of a summary judgment motion, so that a motion for summary judgment, without more, would put an opposing party with a burden of proof to the task of producing evidence sufficient to sustain a favorable verdict. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 Chicago L. Rev. 72 (1977). On the other hand, Professor Moore has suggested that the burden never shifts on motion for summary judgment, but rather always remains with the movant, regardless of the ultimate burden at trial. 6 Moore, ¶ 56.15[3], 56-480 to 56-481. The distinction should not, however, affect the outcome of a motion for summary judgment such as is involved in the pending litigation. Professor Moore cites with apparent approval the decision of Judge Hand in *Dyer*

In sum, since courts properly consider a plaintiff's elevated standard of proof in deciding motions for directed verdict, it would be illogical *not* to do the same when a functionally equivalent motion for summary judgment is presented.

2. *Analysis of Independent Appellate Review Demonstrates that the "Convincing Clarity" Standard is Not Limited to Credibility Judgments Which Must Await Trial*

If the "convincing clarity" standard applied only to the fact finder's determinations of credibility, then the Court of Appeals would have been correct in disregarding the standard on summary judgment, because prior to trial such determinations are obviously impossible. But the "convincing clarity" standard is not applicable only to credibility judgments. In *Bose Corp. v. Consumers Union of the United States, Inc.*, *supra*, the Court, accepting the trial court's credibility finding that the testimony of the author of the article in question was not believable in crucial respects, nonetheless held that "the record [did] not contain *clear and convincing evidence* that [he] or his employer [the defendant] prepared" the article with actual malice. 104 S.Ct. at 1967 (emphasis supplied).

The teaching of *Bose*, then, is that "convincing clarity" is the standard employed during independent appellate review of libel judgments, even where the appellate court adopts or is bound by credibility findings of the trier of fact. So, too, on

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v. MacDougall, 201 F.2d 265 (2d Cir. 1952) to the effect that if the defendants in a slander action presented proof that the plaintiff would not have enough evidence to go to the jury on whether or not the defendants had made the utterances complained of, then "the judgment was right." *Id.* at 268. Further, he stresses that a party opposing summary judgment is subject to considerable risk, and justifiably so, "where he has made no attempt to avail himself of Rule 56(f) and on the papers before the court the moving party is entitled to summary judgment. Certainly the opposing party cannot hold back his evidence until trial. To permit that would stultify the summary judgment procedure." 6 Moore, ¶ 56.15[6] at p. 56-605 (footnote and citations omitted). Thus, an opposing party without countervailing evidence or the prospect of any, cannot secure a denial of the motion "on the basis of a hope that such evidence will develop at the trial." *Id.*, ¶ 56.15[3] at p. 56-481.

summary judgment, where the court assumes that the plaintiff's witnesses will be credited and the defendant's will not; if the plaintiff has not made a "clear and convincing" case, the defendant's motion should be granted.[5]

3. *In Other Contexts Courts Have Routinely Employed Similar Heightened Burdens of Proof on Summary Judgment*

Summary judgment is an inquiry into the *sufficiency* of the plaintiff's evidence,[6] and that inquiry can only be undertaken by reference to what it is that he must prove to get to a jury at trial. Plaintiff must show that there are *genuine* issues of *material* fact, Fed. R. Civ. P. 56(c), and materiality of facts simply cannot be determined in a vacuum.[7] In short, "[b]y

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5 Because plaintiffs are required to marshal their evidence at the summary judgment stage, the district judge in *Bose* presumably had before him in 1981 substantially the same evidence that this Court considered while exercising independent review on appeal in 1984, albeit the testimony was in deposition, rather than trial transcript, form. If so, surely the plaintiff, the defendant, the courts and the First Amendment would have been better served had judgment been granted to the defendant by the district court, employing the "convincing clarity" standard and disregarding witness credibility, than by this Court, years and a long trial later, also employing the "convincing clarity" standard and disregarding witness credibility.

6 *See, e.g., Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 495 (5th Cir. 1982); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 470 (1984).

7 *See, e.g., Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395, 399, *cert. denied*, 434 U.S. 891 (1977):

> "When a defendant's communications are constitutionally privileged, a plaintiff cannot prevail at trial unless he establishes malice with convincing clarity. This is the standard against which the court must examine the evidence on motion for summary judgment because this is the standard that determines materiality of disputed questions of facts."

Many courts have stated that a "material" fact is one that is outcome-determinative under the applicable law. *E.g., Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

entering summary judgment the Court is, in effect, concluding that, *based on the evidence upon which the plaintiff intends to rely at trial*, no reasonable jury could return a verdict for the plaintiff." *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 463 (9th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (emphasis supplied).

Federal courts considering summary judgment motions do, in fact, consistently recognize heightened burdens of proof in determining whether evidence has been elicited sufficient to present an issue reasonably subject to jury adjudication. For example:

- Where union liability for damage caused by an unlawful strike depends on "clear, unequivocal and convincing" proof that it authorized or ratified the strike, summary judgment will be granted in favor of the union if the plaintiff "cannot prevail on the merits" by meeting that high standard of proof. *Falls Stamping & Welding Co. v. International Union*, 744 F.2d 521, 526-27 (6th Cir. 1984) ("The Company's allegations that were made in the district court, even if true, would not affect the result, based on [the clear and convincing standard].")

- Where a fraud suit requires clear and convincing evidence of intent to deceive, summary judgment will be granted where the evidence of intent produced in opposition to the motion could not reasonably be viewed as clear and convincing. *United States v. Thompson*, 210 F.2d 724, 726 (D. C. Cir. 1953) ("Of course we do not say the [defendant] did not intend to deceive. On the whole there are indications that he did. But such indications are not enough. Fraud must appear by clear and satisfactory, or convincing, evidence.")

- Where plaintiff's suit for reformation of a contract requires "clear, unequivocal and convincing" evidence of fraud, defendant's summary judgment motion will be considered in light of that high standard. *Hutcheson v. Frito-Lay, Inc.*, 315 F.2d 818, 821 (8th Cir. 1963).

- Where a "clear and patent violation" of the statute must be shown to entitle plaintiff to an injunction in a private suit, defendant will prevail on motion for summary judgment if plaintiff's opposition shows that he will not be able to meet that high standard. *Aaacon Auto Transport, Inc. v. Medlin*, 575 F.2d 1102, 1103-04 (5th Cir. 1978).

- Where proof of an antitrust conspiracy from circumstantial evidence requires that the inference of unlawfulness be "compelling", that standard will be applied on summary judgment in favor of defendants. *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 463 (9th Cir. 1981).

- Where a claimant to title bears a "heavy burden" of proving adverse possession, and the law supplies a special presumption against his claim, these rules will be applied in granting defendant's motion for summary judgment. *United States v. Gossett*, 416 F.2d 565, 568 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970).

- Where a plaintiff seeking to invalidate a statute or regulation must show "clear and convincing proof that there is no rational basis for the legislation," that standard is relevant to the analysis leading to grant of summary judgment sustaining the enactment. *Michigan Meat Ass'n v. Block*, 514 F.Supp. 560, 565 (W.D. Mich. 1981).

- Where a lawsuit challenging imposition of a trusteeship on a local by the international union requires "clear and convincing proof" that it was not established "in good faith," 29 U.S.C. § 464(c), summary judgment will be granted for the international defendant in light of that standard. *Miller v. Laborer's International Union*, 82 Lab. Cas. (CCH) ¶ 10,231 at p. 16,894 (D.D.C. 1977).

Indeed, where the law supplies presumptions that tip the evidentiary burden in favor of one of the parties, that party

generally gets the benefit of such presumptions upon summary judgment.[8] By the same token, when the party *moving* for summary judgment bears a heightened burden of proof, courts routinely consider that in assessing that party's motion.[9] These cases merely underscore the general proposition that a court must consider any summary judgment motion in light of the applicable standard of proof.

That courts consider the presence of an especially high standard of proof on summary judgment motions does not mean, of course, that the party bearing it always loses. *See, e.g., Rebozo v. Washington Post Co.*, 637 F.2d 375, 381 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981). *Rebozo* squarely held that the public figure libel plaintiff must show that he can meet the "higher standard" of "clear and convincing" evidence to withstand summary judgment, and proceeded to determine that on the particular facts of the case the plaintiff had done

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8 *E.g., Wermager v. Cormorant Township Board*, 716 F.2d 1211, 1214 (8th Cir. 1983); *Tee-Pak, Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974); *Engl v. Aetna Life Insurance Co.*, 139 F.2d 469, 472 (2d Cir. 1943) (Clark, J.) (evidence presented on motion must be "construed in the light of the underlying law . . .").

9 *See, e.g., Toney v. Bergland*, 645 F.2d 1063, 1066 (D.C. Cir. 1981) (reversing grant of summary judgment: "The losing party is especially entitled to the benefit of reasonable factual doubt where, as here, the successful party had the burden to make his case by 'clear and convincing' evidence."); *THI Hawaii, Inc. v. First Commerce Financial Corp.*, 627 F.2d 991, 995 (9th Cir. 1980) (where an antitrust defendant would be absolved of liability by meeting a stringent "but for" test as to plaintiff's complete involvement in the conspiracy, summary judgment is properly granted for the defendant when his motion papers show that he has "met this high burden of proof"); *United States v. Prince*, 348 F.2d 746, 748 & n.3 (2d Cir. 1965) (summary judgment for government, asserting fraud, is reversed; government bore "clear and convincing" burden and its "moving papers furnish no factual basis for a finding *that the burden is met*") (emphasis supplied); *Kangaroos U.S.A., Inc. v. Caldor, Inc.*, 585 F.Supp. 1516 (S.D.N.Y. 1984) (where a defendant alleges that the patent in suit is unenforceable because of fraud on the patent office, he may win a summary judgment motion, but only by satisfying the "clear and convincing proof" standard that applies to claims of fraud).

so. Again, this result is consistent with what courts do in other areas of the law.[10]

The reasoning and result of the Court of Appeals below creates out of whole cloth an exception to this analysis. The question, then, is whether the reasons given for fashioning this idiosyncratic rule for actual malice libel cases support the decision below.

C. The Court of Appeals' Reasons for Disregarding the Applicable Standard of Proof in Libel Summary Judgment Motions are Untenable

The Court of Appeals employed three arguments in support of its result. They are (1) that acknowledging the standard of proof the plaintiff must meet at trial at the summary judgment stage would force the plaintiff to marshal all the facts supporting his case, which was seen as inconsistent with the "threshold" nature of a summary judgment motion, (2) that this Court's dictum in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 & n.9 (1979), implies disregard of the requirements of a libel plaintiff's prima facie case at the summary judgment stage, and (3) that the distinction between "probable cause" and "beyond a reasonable doubt" in the criminal law analogously suggests such disregard. Each of these arguments is fundamentally flawed. The first ignores actual summary judgment procedure and its role in civil litigation; the second reads far more into the *Hutchinson* footnote than *amici* believe was intended; the third mischaracterizes criminal procedure and results in a false analogy.

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10 *See, e.g., Hawkins v. Hawkins*, 271 F.2d 870, 875 (5th Cir. 1959) (proof of intent to change beneficiary on insurance policy must be "clear and convincing"; party bearing this burden withstands summary judgment when, opposing motion, she makes "exceptionally strong case" sufficient to meet that burden if her version of facts is credited at trial); *Hotel & Restaurant Employees & Bartenders Int'l Union v. Rollison*, 615 F.2d 788, 793 (9th Cir. 1980) (party bearing "clear and convincing" standard shows sufficient facts, in opposing summary judgment, to meet that standard).

1. *Summary Judgment Requires the Non-Movant to Marshal His Evidence*

The Court of Appeals' novel characterization of summary judgment as a "threshold" proceeding, and its surprising suggestion that a libel plaintiff should not be compelled to disclose his most persuasive evidence then, are contrary to settled principles of summary judgment practice. In seriously contested lawsuits, summary judgment motions are ordinarily made and decided at the close of often voluminous discovery, not at the "threshold."[11] They are powerful tools to regulate court business efficiently by screening out cases that do not require a trial, thereby conserving resources of the courts as well as those of the parties, *including the plaintiff*, who is put to as much needless expense by trying a case he cannot win as is the defendant.

Prior to the decision below, federal courts had been unanimous that a party against whom summary judgment is sought must show all—or at least his best—evidence at peril of dismissal. Judge Charles E. Clark, who as Dean of Yale Law School had been reporter of the Rules Advisory Committee at the time of the principal drafting of the Federal Rules,[12] explained the philosophy of Rule 56 in one of the earliest decisions on the subject:

> If one may . . . reserve one's evidence when faced with a motion for summary judgment there would be little opportunity "to pierce the allegations of fact in the pleadings" or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the

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11 If the motion is made before material discovery is complete, the federal rules contemplate that the court will defer decision until the non-movant has had an opportunity to complete all relevant discovery. Fed. R. Civ. P. 56(f).

12 Judge Clark's major role in developing the Federal Rules of Civil Procedure is described in 4 Wright & Miller, *supra*, § 1004 at pp. 45-46.

> trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions.

Engl v. Aetna Life Insurance Co., 139 F.2d 469, 473 (2d Cir. 1943). Decisions expressing the same view are legion:

> [A] litigant faced with a sufficiently supported motion for summary judgment cannot simply sit back and say "I have a good answer to all this but I won't disclose it now."

In re B.D. International Discount Corp., 701 F.2d 1071, 1077 n.11 (2d Cir.), *cert. denied*, 104 S.Ct. 108 (1983).

> No longer may a [litigant], under Federal Practice, play a game of hide and seek, refuse to show his hand, and thus place on the trial court and the opposing party, the unnecessary burden of facing a long, arduous and expensive trial.

United States v. Gossett, 416 F.2d 565, 568 (9th Cir. 1969).

> A party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial. A summary judgment motion is intended to "smoke out" the facts so that the judge can decide if anything remains to be tried.

Donnelly v. Guion, 467 F.2d 290, 293 (2d Cir. 1972).[13]

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13 *See also, Otteson v. United States*, 622 F.2d 516, 520 (10th Cir. 1980); *Inland Oil & Transport Co. v. United States*, 600 F.2d 725, 728 (8th Cir.), *cert. denied*, 444 U.S. 991 (1979); *Downes v. Beach*, 587 F.2d 469, 472 (10th Cir. 1978) (party opposing summary judgment has affirmative duty to bring his evidence to court's attention, at peril of dismissal); *Golden Oil Co. v. Exxon Co.*, 543 F.2d 548, 551 (5th Cir. 1976); *E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 205 (D.C. Cir. 1974); *Bland v. Norfolk & So. R. Co.*, 406 F.2d 863, 866 (4th Cir. 1969); *Turner v. Lundquist*, 377 F.2d 44, 48 (9th Cir. 1967); *Robin Construction Co. v. United States*, 345 F.2d 610, 613 (3d Cir. 1965).

2. *The* Hutchinson *Footnote Does Not Address Standards of Proof*

The Court of Appeals' reliance on the dictum in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 & n.9 (1979) is also off the mark. In *Hutchinson*, this Court commented on the proposition that "summary judgment might well be the rule rather than the exception" in actual malice libel cases:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and does not readily lend itself to summary disposition. *See* 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2730, pp. 590-592 (1973). *Cf. Herbert v. Lando*, 441 U.S. 153 (1979). In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.

This dictum, which is more fully discussed in Point Two *infra*, neither explicitly nor implicitly bears on the standard of proof to be applied at the summary judgment stage. Nothing in *Hutchinson* or in any other decision of this Court even suggests that the district court, using the proper *manner* of examination of the facts, measures the evidence against any *standard* other than the "clear and convincing" standard enunciated in *New York Times*. Certainly the footnote does not mean that defendants in libel cases should be subject to disfavorable rules of procedure not applied elsewhere, the result apparently reached below. Indeed, most courts have construed the footnote as mandating summary judgment procedures in libel cases that are no different from those applied in other contexts. *See, e.g., Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980).[14]

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14 The Libel Defense Resource Center, an organization that monitors and compiles information and statistics concerning media litigation, reports that, since the *Hutchinson* decision, 76% of the 114 reported libel summary

And, as we have seen, courts in other areas of the law regularly determine summary judgment motions in accordance with applicable standards of proof.

3. *The Analogy to Criminal Procedure Underscores the Error Below*

The Court of Appeals' analogy to the "probable cause" standard in criminal cases (Slip op. at 12) is ill-founded. The court confused two distinct tests that apply at two different stages of both civil and criminal litigation: the standard that must be met to initiate a proceeding and that which must be satisfied to get it to a jury.

Because of the serious consequences of criminal charges, a criminal proceeding may be *initiated* only by indictment or information grounded in "probable cause" to believe an offense has occurred. The analogy in civil procedure is to Fed. R. Civ. P. 11, which requires merely a reasonable belief that facts might be established to support a claim, not a showing that they have been established. *See Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980). That standard, however, falls far short of what a civil plaintiff must adduce to survive a motion for summary judgment. There, he must demonstrate that he *can* prove his case with sufficient evidence.

Federal criminal law has no counterpart to summary judgment. *See United States v. Calandra*, 414 U.S. 338, 345 (1974) (indictment regular on its face cannot be dismissed before trial for insufficient evidence). The criminal motion for acquittal, Fed. R. Crim. P. 29, however, is precisely analogous to a civil directed verdict, which in turn employs the same standard used for testing evidentiary sufficiency as is required on summary judgment (*see* pp. 6-10, *supra*). As the Court of Appeals below recognized, motions for acquittal are judged by whether a reasonable jury could find guilt upon the "heightened stan-

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judgment decisions in actual malice cases have explicitly applied a "neutral" approach to summary judgment. *See* Libel Defense Resource Center, Study No. 6, Bulletin No. 12 (Dec. 31, 1984) *and* Bulletin No. 4, Part 2 (Oct. 15, 1982).

dard" of beyond a reasonable doubt that is mandated by substantive criminal law (Slip op. at 12). Analogously, civil motions for directed verdict and, hence, for summary judgment employ whatever legal standard is supplied by the substantive law, such as the "heightened standard" required in public figure libel cases. In short, the analogy to criminal procedure not only does not support, but strongly undercuts, the analysis of the court below.

D. Conclusion: The Court of Appeals' Holding Must Be Rejected

Summary judgment is a procedure designed to avoid trials of cases that a party cannot win, because to answer the motion the party is required to produce sufficient facts to demonstrate that he can survive a directed verdict. This salutary and well-understood procedure was emasculated by the decision below under which, in a public figure libel case, the parties may be speeded on their way to trial even if the plaintiff fails to demonstrate that he has enough evidence to win before a reasonable jury.

This Court should therefore reaffirm the conclusion of the vast majority of federal and state courts, which have agreed that the "clear and convincing" standard is relevant and must be met by the public figure or public official plaintiff on a libel defendant's motion for summary judgment:

> [A] judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, a reasonable jury could find malice with convincing clarity.

Yiamouyiannis v. Consumers Union of the United States, Inc., *supra*, 619 F.2d at 940.[15]

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15 *Accord* (appellate courts): *Rebozo v. Washington Post Co.*, 637 F.2d 375, 381 (5th Cir. 1981); *Fadell v. Minneapolis Star & Tribune Co.*, 557 F.2d 107, 108 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); *Carson v. Allied News Co.*, 529 F.2d 206, 208 (7th Cir. 1976); *Cervantes v. Time, Inc.*, 464 F.2d 986, 995 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Reader's Digest Ass'n*

POINT TWO

IF THE ACTUAL MALICE TEST IS FIRMLY AND CONSCIENTIOUSLY APPLIED, SUMMARY JUDGMENT WILL FREQUENTLY BE GRANTED IN PUBLIC FIGURE LIBEL CASES

A. The Actual Malice Test Applied to Libel Suits Properly Results in Frequent Summary Judgments for Defendants

The Court of Appeals' refusal to apply the "convincing clarity" standard appears to contain an implicit message generally downgrading the significance and availability of summary judgment in public figure libel cases. It takes the *Hutchinson* footnote several steps beyond its meaning, in a direction *amici* submit is unwise and unsupportable. In this larger sense the decision below requires some reconsideration of why summary judgment for defendants in such cases is, has been and should be readily available and frequently granted.

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v. Superior Court, 37 Cal.3d 244, 690 P.2d 610, 614, 208 Cal. Rptr. 137, 141 (1984); *DiLeo v. Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980); *Nader v. de Toledano*, 408 A.2d 31 (D.C. Ct. App. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Lampkin-Asam v. Miami Daily News, Inc.*, 408 So.2d 666, 668 (Fla. Dist. Ct. App.), *pet. denied*, 417 So.2d 329 (Fla.), *cert. denied*, 459 U.S. 806 (1982); *Sigman v. Gove*, 169 Ga. App. 580, 314 S.E.2d 238 (1984); *Mehau v. Gannett Pacific Corp.*, 66 Haw. 133, 658 P.2d 312, 321 (1983); *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395, 399, *cert. denied*, 434 U.S. 891 (1977); *National Ass'n of Government Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996, 1003 (1979), *cert. denied*, 446 U.S. 935 (1980); *Tucci v. Guy Gannett Publishing Co.*, 464 A.2d 161, 166 (Me. 1983); *Bukky v. Painesville Tel. & Lake Geauga Printing Co.*, 68 Ohio St.2d 45, 428 N.E.2d 405, 407 (1981); *Koch v. Laborico*, 66 Or. App. 78, 674 P.2d 602, 607 (1983), *rev. denied*, 296 Or. 712, 678 P.2d 740 (1984); *Brophy v. Philadelphia Newspapers*, 281 Pa. Super. 588, 422 A.2d 625, 632 (1980); *Mark v. Seattle Times*, 96 Wash.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982); *Chase v. Daily Record, Inc.*, 83 Wash.2d 37, 515 P.2d 154, 157 (1973).

Contra (appellate courts): *American Benefit Life Ins. Co. v. McIntyre*, 375 So.2d 239, 249 (Ala. 1979); *Green v. Northern Publishing Co.*, 655 P.2d 736 (Alaska 1982), *cert. denied*, 463 U.S. 1208 (1983); *Wise v. Dallas Southwest Media Corp.*, 596 S.W.2d 533, 536 (Tex. Civ. App. 1979).

Amici urge that it is not analytically helpful to dwell on the question whether summary judgment is the "rule" or the "exception" in actual malice cases. Any conclusion in those terms is necessarily ambiguous. Certainly the Court has never said that summary judgment is the "rule" in that there is a presumption or bias in favor of summary judgment for defendants that ought to be at work in public figure or public official cases irrespective of their facts. "[T]he question whether summary judgment is appropriate in any case is one to be decided on the particular facts of that case." *First National Bank v. Cities Service Co.*, 391 U.S. 253, 259 (1968). But in the sense of describing the outcome of such motions in actual malice libel suits, summary judgment may surely be said to be the "rule" insofar as courts on the particular facts before them tend to grant such motions for defendants more often than they deny them.[16] *Cf. Dun & Bradstreet v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866, 4871 (1985) (White, J., concurring) ("[The public figure or public official plaintiff] frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice.")[17]

The actual malice standard is and is intended to be "exceedingly difficult to satisfy." *Id.* Publication of news by the media with actual malice, *i.e.*, knowledge of falsity or subjective awareness of probable falsity, is unusual. Reporters and editors may get their facts wrong from time to time, occasionally as a result of failure to exercise due care. But they have little

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16 Post-*Hutchinson* compilations by the Libel Defense Resource Center cited in footnote 14, *supra*, show that summary judgments were granted in 76% of actual malice cases from 1980 to 1984.

17 The vast majority of federal criminal cases result in convictions. *See* Annual Report of the Director of the Administrative Office of the United States Courts, 1984, Appendix Table D-4 (81% of total defendants convicted within reporting period). It would thus be correct, descriptively, to say that "convictions are the rule, rather than the exception, in federal criminal cases." Such a statement would of course be entirely wrong, though, were it taken to mean that there is a special rule of criminal law or procedure favoring criminal prosecution, or that the courts are predisposed to convict irrespective of the facts of the particular cases before them.

incentive, if any, to lie to their own readers and viewers. Rarely do they do so.

Because actual malice involves the "state of mind" of the defendant, however, *Herbert v. Lando*, 441 U.S. 153, 160 (1979), in many cases the fact that defendants did not harbor actual malice at the time of publication cannot become clear until the broad discovery permitted by *Herbert* is complete and a motion for summary judgment has been made. When the facts as to what the reporter did, what documents he referred to, who his non-confidential sources were and what they told him (much of that usually unknown by anyone other than defendants at the outset of the litigation) are not materially disputed at summary judgment, as is often the case, the district court is well equipped to determine whether the inferences the plaintiff would draw from those facts would be constitutionally sufficient to prove actual malice with convincing clarity. Whether or not called a "rule", then, summary judgment for media defendants is common in actual malice cases.[18]

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18 This Court has observed that in other contexts, *e.g.* qualified protection for the acts of public officials, summary judgment was rarely—indeed, *too* rarely—available when "state of mind" was in issue. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). But in actual malice libel cases, summary judgment is frequently granted *despite* the fact that actual malice is a "state of mind." *Amici* suggest that this is so for a variety of reasons, including the fact that the burden of proving actual malice is on the plaintiff, that it must be proved with "convincing clarity," that the relevant proof is often "in the form of objective evidence" (*Herbert v. Lando*, *supra*, 441 U.S. at 160) available at the time the motion is made, and that, as suggested above, discovery rarely provides substantial evidence that defendants were guilty of it.

> A party against whom summary judgment is sought is not entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce *the requisite quantum of evidence* to enable him to reach the jury with his claim.

Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir. 1975) (emphasis supplied), *cert. denied*, 425 U.S. 904 (1976), *citing Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966) *cert. denied*, 385 U.S. 1011 (1967) (public official libel case).

The extraordinarily high rate of reversals of libel verdicts on appeal for want of constitutionally sufficient evidence of actual malice suggest that, if anything, increased use of summary proceedings is required. The reversal rate demonstrates that (1) the media have been subjected to unnecessary trials to an extent unmatched by any other class of defendants known to *amici* and (2) juries are regularly returning verdicts against the press that are constitutionally infirm and, it may be inferred, premised not on the law as charged but on constitutionally invalid grounds such as punishment of unpopular speech.[19] Untold damage is done to plaintiffs, defendants, the judicial system, and free discourse by these consistent misadventures.

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19 Two substantial studies commissioned by the American Bar Foundation have demonstrated the burdens inflicted upon defamation defendants by trials which produce jury verdicts vacated on motion or reversed on appeal. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, American Bar Foundation Research Journal, Vol. 1980, Summer No. 3, 457; Franklin, *Suing Media for Libel: A Litigation Study*, American Bar Foundation Research Journal, Vol. 1981, Summer No. 3, 797. In both studies, a very small percentage of plaintiffs emerged from the appellate process with judgments. In cases that went to trial, plaintiffs received a significant percentage of jury verdicts; but more than one-half of such verdicts were lost on appeal.

More recent studies by the Libel Defense Resource Center show that plaintiffs won 67% of trial decisions in actual malice cases tried to juries or courts in 1980-84. Judgments for all types of libel plaintiffs after a trial, however, were reversed and the case dismissed in 57% of appeals decided during the same time period. Libel Defense Resource Center, Bulletin No. 11 at 11, 20 (Nov. 15, 1984). This may be compared to the overall reversal rate in the federal courts of appeal for private civil litigation, which, according to the most recent figures, is 18.7%. Annual Report of the Director of the Administrative Office of the United States Courts, 1984, Appendix Table B-1. (The report covers cases disposed of during the 12-month period ended June 30, 1984. The figure quoted is for "other private civil" appeals, excluding criminal cases, prisoner petitions, civil litigation involving the government, bankruptcy, administrative appeals and original proceedings.)

B. Firm Enforcement of Summary Judgment Procedure is Peculiarly Important Where Litigation May Be Motivated by the Desire to Silence or Harass

All persons, of course, are entitled to the protection of the law of libel. The case at bar, however, exemplifies the particular need for full availability of summary judgment for the expeditious disposition of groundless libel suits that may be intended to silence opposing voices. "[M]any self-perceived victims of defamation are animated by something more than a rational calculus of their chances of recovery. Given the circumstances under which libel actions arise, plaintiffs' pretrial maneuvers may be fashioned more with an eye to deterrence or retaliation than to unearthing germane material." *Herbert v. Lando*, *supra*, 441 U. S. at 204-05 (Marshall, J., dissenting). The *Sullivan* case was itself an example—a suit apparently brought to punish those who ran an advertisement attacking police actions in the South against civil rights protesters. The suit seemed to be part of a larger effort to silence or punish segments of the press perceived to be at odds with local sentiment. *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 278 n.18; *id.* at 294-95 (Black, J., concurring).

Respondent Liberty Lobby has made something of a career of unsuccessfully suing its critics for libel and related torts.[20] It

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20 In 1962, Liberty Lobby's chairman sued Drew Pearson for libel in characterizing his congressional testimony as "anti-Semitic." Summary judgment was granted to defendant on grounds of truth. *Dall v. Pearson*, 246 F. Supp. 812 (D.D.C. 1963), *aff'd*, No. 18,414 (D.C. Cir. Oct. 22, 1964), *cert. denied*, 380 U.S. 965 (1965). Thereafter, Pearson published papers belonging to Liberty Lobby and its founder and chief executive, Willis Carto, that exposed Carto's animosity toward Jews. Liberty Lobby sued to enjoin publication, and lost. On appeal, then-Circuit Judge Burger's opinion noted the "reprehensible" "overtones of anti-Semitism and racism" in Liberty Lobby's publications and activities. *Liberty Lobby v. Pearson*, 390 F.2d 489, 491 n.7 (D.C. Cir. 1967). In the 1970s, Liberty Lobby sued the Anti-Defamation League of B'nai B'rith for alleged interference with contractual relations; the ADL had informed radio stations carrying Liberty Lobby programs that the group was anti-Semitic. *Liberty Lobby v. Anti-Defamation League*, No. 76-760-1 (D.Ct. McLennan Co., Tex.). The suit was

is not alone. There is ample evidence that the "lawsuit as a weapon" has been discovered by groups committed to suppressing speech critical of their activities.

The Synanon Church, for example, has been judicially described as an organization involved in "repeated attacks and threats of violence . . . against those perceived as enemies of the organization." *Synanon Church v. United States*, 579 F. Supp. 967, 971 (D.D.C. 1984). In addition to acts of physical violence against its "enemies" and the willful destruction of evidence for the purpose of disguising its true nature from others in litigation in which it is involved (*id.* at 972-74), Synanon embarked upon a massive nationwide campaign of retraction demands, followed by the bringing of a number of defamation actions to stifle adverse comment. *Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244, 255-56, 690 P.2d 610, 617, 208 Cal. Rptr. 137, 144 (1984). For a time, the rash of suits caused many publications, particularly smaller newspapers, to "ease up" in their coverage. After years of litigation with Synanon, a major newspaper group, having had its case reach the California Supreme Court, paid a substantial settle-

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withdrawn before any decision on the merits. Liberty Lobby sued William Buckley's *National Review* for libel in linking it with the United States Labor Party and related groups, some of whose activities were described as being pro-Palestinian and anti-Semitic; summary judgment was granted for defendant. *Liberty Lobby v. National Review, Inc.*, Civ. Action No. 79-3445 (D.D.C., June 17, 1983). Liberty Lobby has been denounced as anti-Semitic in Congress, *see*, Cong. Rec., July 18, 1974 at 24201, and in writing by its own former general counsel. *See, e.g.*, Washington Post, Apr. 26, 1981, at p. A4. Undaunted, Liberty Lobby now has libel suits pending against, among others, present *amicus* Dow Jones & Company, Inc., whose *Wall Street Journal* referred to it as "anti-Semitic." *Liberty Lobby v. Dow Jones & Co., Inc.*, Civ. Action No. 84-3445 (D.D.C., filed Nov. 15, 1984). And, of course, in the present suit Liberty Lobby sued columnist Anderson for, among other things, calling it and Mr. Carto anti-Semitic—a claim that, even under the Court of Appeals' analysis, did not survive summary judgment. Meanwhile, however, as a result of that same analysis, the defendants must stand trial on questions such as whether they truly believed that Mr. Carto transacts business from public phone booths.

ment sum to get rid of the costly and time consuming litigation.[21]

The Church of Scientology, which has been described as having a "practice of harassing its 'suppressors' " (*Church of Scientology v. Dept. of State*, 493 F. Supp. 418, 421 (D.D.C. 1980)), is another example. It has initiated a spate of libel suits against former Church members, authors and the media.[22]

Litigation itself, regardless of its outcome, provides such litigants with ample tools for harassment. As the Court noted in an opinion concerning policy grounds for limiting the spread of fraud actions under the federal securities laws, there is a "danger of vexatious litigation" since "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1974).

These concepts apply with extraordinary force in defamation actions brought against the media by public officials and public figures. "For the stake here, if harassment succeeds, is free debate." *Washington Post Co. v. Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966) (function of summary judgment in libel cases).

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21 *See Leaning on the Press*, Newsweek, Nov. 20, 1978, at 133 and *The Trouble at Synanon*, Newsweek, June 26, 1978, at 31.

22 *See The Limits for Libel*, The New York Times, July 29, 1983, at 23, col. 2; *Leaning on the Press*, Newsweek, *supra*; and *Cults in America and Public Policy*, Congressional Quarterly, Editorial Research Reports—The Report, Vol. 1, No. 14, p. 267 (Apr. 13, 1979).

C. Summary Judgment is an Important Means of Implementing the Goals of *New York Times Co. v. Sullivan*

It would be mistaken, *amici* submit, to suggest that the protection for speech and the press that was thought to have been established by the *New York Times* actual malice test may be used as an argument for diminishing the role summary judgment would ordinarily play in civil litigation, or to consider evenhanded but firm adherence to general summary judgment procedures in libel cases a form of "double counting" in favor of defendants. *Cf. Calder v. Jones*, 104 S.Ct. 1482, 1488 (1984). When objectively reasonable and careful reliance on copious documentation does not suffice to dispose of a hopeless libel charge by a public figure because of suspicions about the writer's "state of mind" on tangential bits and pieces of the story, as in the present case (compare opinion below with that of the district court, 562 F. Supp. 201, 208-09 (D.D.C. 1983)), something is amiss. The heightened standard of proof established in *New York Times* should go hand in hand with the plenary procedural protection afforded by the summary judgment motion so that the substantive protections do not "operate[ ] too late in the litigation process" to vindicate the First Amendment rights that are at stake. Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422, 456 (1975); Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 Hofstra L. Rev. 655, 687-720 (1979).

The necessity for uncompromising application of summary judgment principles in testing the libel plaintiff's case can thus be justified on both practical and constitutional grounds. There is no point in clogging the courts with trials that lead to verdicts that must regularly be reversed. Summary judgment provides a full-blown opportunity to assay the sufficiency of plaintiff's case and is intended to screen out those not warranting trial. And, to the extent that the trials and unsupportable verdicts resulting from any supposed presumption disfavoring summary judgment become merely devices to punish or tax constitutionally protected speech that juries find objectionable, the result is an unconstitutional burden on freedom of expression.

CONCLUSION

The Court should rule that a judge, in denying a defendant's summary judgment motion in a libel suit by a public figure, must conclude that based on the evidence elicited by the plaintiff a reasonable jury could find actual malice with convincing clarity. It should therefore reverse the contrary holding of the Court of Appeals and its mistaken analysis of the facts based on that holding.

Dated: July 18, 1985

Respectfully submitted,

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APPENDIX

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The American Newspaper Publishers Association is a national trade association of nearly 1,400 newspapers, representing about 99% of the daily newspaper circulation in the United States.

The American Society of Newspaper Editors is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include ongoing efforts to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Association of American Publishers, Inc. ("AAP"), a not-for-profit trade association organized under the laws of the State of New York, is the major national association of book publishers in the United States. AAP's approximately 325 members include most of the leading commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish in the aggregate a majority of all general and educational books published in the United States.

CBS Inc., through its CBS News Division, is engaged in the nationwide dissemination of news over the facilities of the CBS Television and Radio Networks. In addition, CBS provides extensive news coverage through its five owned television stations, and thirteen owned AM and FM radio stations. The CBS Publishing Group publishes numerous nationally distributed magazines and hard-cover books.

The Chicago Tribune Company, a subsidiary of Tribune Company, publishes the *Chicago Tribune*, the largest-circulation metropolitan daily and Sunday newspaper in Illinois.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, a variety of national and international electronic news services, textbooks through its Richard D. Irwin, Inc. subsidi-

ary, and 22 community daily newspapers through its Ottaway Newspapers, Inc. subsidiary.

The Hearst Corporation is a diversified privately-held company which is engaged in a broad spectrum of commercial activities including communications. It publishes nationally distributed magazines, newspapers and hard-cover and soft-cover books, and it owns and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

The Magazine Publishers Association is a national industry association which represents 242 publishing firms that publish 1,150 different magazines, journals of literature and opinion and special interest publications on numerous subjects including politics, business, corporate, product and consumer information.

The Miami Herald Publishing Company is an unincorporated division of Knight-Ridder Newspapers, Inc., which publishes *The Miami Herald*, a daily newspaper of general circulation throughout Florida.

National Broadcasting Company, Inc., a wholly owned subsidiary of RCA Corporation, is engaged in the broadcasting business. It owns and operates five television stations, a television network, eight radio stations and a radio network.

Newsweek, Inc. publishes a weekly international news magazine, *Newsweek*.

The New York Times Company publishes *The New York Times*, 33 other newspapers of local or regional circulation, and the national magazines *Family Circle*, *Golf Digest*, *Tennis* and *Cruising World*. The New York Times Company also owns three television stations, two radio stations and cable TV systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to the protection of the First Amendment interests of the media and the public. The Reporters Committee has provided representation, legal guidance and research in major press freedom cases since 1970.

The Society of Professional Journalists, Sigma Delta Chi is a voluntary, not-for-profit organization of nearly 28,000 members representing every branch and rank of print and broadcast journalism. The Society's purposes, expressed by its founders in 1909, include "work to safeguard the flow of information from all sources to the public so that it has access to the truths required to make democracy function and to protect our freedoms."

Time Incorporated is the largest publisher of general circulation magazines in the United States. It publishes TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, LIFE and DISCOVER.

The Times Mirror Company is the publisher of the *Los Angeles Times* and seven other metropolitan and community newspapers.

Westinghouse Broadcasting and Cable, Inc. owns and operates 16 broadcasting stations, including three all-news radio stations, as well as THE NEWSFEED NETWORK, one of the largest syndicated news services providing hard news and news features to over 70 local U.S. television stations.

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No. 84-1602

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,
Petitioners,

vs.

LIBERTY LOBBY, INC. and WILLIS A. CARTO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF OF AMICUS CURIAE THE READER'S DIGEST ASSOCIATION, INC., IN SUPPORT OF POSITION OF PETITIONERS

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Reader's Digest Association, Inc. ("RDA"), is a respondent in a libel case now pending before this Court on petition for writ of certiorari, captioned *The Synanon Church, et al. v. Reader's Digest Association, Inc., et al.*, No. 84-1304. In that case, RDA moved for summary judgment on the ground that petitioners, the Synanon Church and Charles Dederich (hereinafter collectively referred to as "Synanon"), were public figures and that, under this Court's decision in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, there was no evidence of "actual malice" in publication of the article alleged to be libelous. After an extensive examination of the law and evidence, the California Supreme Court concluded that:

> "None of the alleged defamatory statements goes beyond what a responsible staff writer might draft on the basis of the information provided him by his sources. The sources themselves were persons of good, indeed distinguished, reputation. There is *nothing at all* in the record to suggest that [the author] MacDonald or anyone else at the Reader's Digest had any serious doubt as to the reliability of the sources or

> the truth of the challenged statements" (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 266, 208 Cal.Rptr. 137, 151, 690 P.2d 610, 624) (emphasis added).

The court concluded that judgment should be entered in favor of RDA.

In the course of its opinion, the court also observed (although it was unnecessary to its holding) that a libel defendant's summary judgment motion should be granted "unless it appears that actual malice may be proved at trial by clear and convincing evidence" (37 Cal.3d 252, 208 Cal.Rptr. 141, 690 P.2d 614). Synanon filed a petition for writ of certiorari (No. 84-1304), emphasizing and distorting this sentence, and seizing upon contrary dictum in *Liberty Lobby, Inc. v. Anderson* (D.C.Cir. 1984) 746 F.2d 1563, 1570-1571. The Court subsequently granted certiorari in *Liberty Lobby* (No. 84-1602) but thus far has not acted on the *Synanon* petition.

Because the "evidence" submitted by Synanon was insufficient to survive a summary judgment motion under *any* standard, *Liberty Lobby* should have no bearing on the litigation against RDA. Nonetheless, it is apparent that Synanon will continue to argue that the two cases are related. Therefore, RDA has a substantial and immediate interest in the outcome of *Liberty Lobby*. More fundamentally, as a member of the media which must constantly be aware of the possibility of being put to the defense of a libel suit, RDA has a continuing interest in decisions affecting the scope of its First Amendment rights.

In the course of Synanon's litigation against RDA, and in other litigation, counsel for RDA have become fully familiar with the law governing this case. In the attached amicus brief, we demonstrate that the chilling effect of protracted libel litigation such as that initiated by Synanon is very real, and that therefore it is imperative that the constitutional protections under the substantive law governing such litigation be applied throughout all stages of the proceedings.

Although petitioners have given consent to the filing of this brief, respondents have refused consent.

For these reasons, we respectfully request that this motion for leave to file a brief amicus curiae be granted.

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BRIEF OF AMICUS CURIAE THE READER'S DIGEST ASSOCIATION, INC., IN SUPPORT OF POSITION OF PETITIONERS

SUMMARY OF ARGUMENT

The issue presented is whether the constitutional limitations upon the substantive law governing libel actions brought by public figure plaintiffs, mandated by the First Amendment under *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, apply upon a motion for summary judgment. In the decision below, the District of Columbia Circuit opined that those constitutional limitations applied only after a full trial and that, in particular, clear and convincing evidence of actual malice need be shown only at trial. According to that court, in order to survive a defendant's summary judgment motion and proceed to trial, a public-figure plaintiff need only show "a minimum of facts" in support of its argument that the allegedly defamatory statement was made with

actual malice (*Liberty Lobby, Inc. v. Anderson* (D.C.Cir. 1984) 746 F.2d 1563, 1570).

Prior to *Liberty Lobby*, there had been virtual unanimity among the state and federal courts that the constitutional standard—that a plaintiff must have clear and convincing evidence of actual malice—applied throughout a defamation action, including on a motion for summary judgment. The *Liberty Lobby* court rejected the established rule in favor of one which gives a libel plaintiff the novel procedural advantage of not being required to present, in opposition to a motion for summary judgment, at least *some* evidence from which a reasonable jury could render a verdict in the plaintiff's favor. In doing so, the court was compelled to conclude that the judicial duty of passing upon the constitutional sufficiency of evidence of actual malice applies only after a full trial. The court attempted to justify side-stepping this duty, citing hypothetical and unrealistic "practical" problems in exercising that constitutional duty at the summary judgment stage (746 F.2d 1570-1571). It thus sacrificed constitutional principles for the sake of assumed administrative efficiency.

The *Liberty Lobby* decision is wrong. It is wrong because it incorrectly suggests that the established rule requires a court to deviate from normal summary judgment procedures. It is wrong because its hypothetical problems will not materialize and have not materialized during the many years in which the established rule has been applied by courts throughout the country. Most important, it is wrong because it fails to take into account the social cost of unnecessarily deferring decisions on issues of constitutional protection. This new rule threatens to chill the exercise of First Amendment rights by the media and other speakers aware of its inevitable protractive effect on libel litigation, and therein lies the real danger of the opinion below.

ARGUMENT

I. THE SYNANON LITIGATION AGAINST RDA ILLUSTRATES THE REAL AND SUBSTANTIAL CHILLING EFFECT OF PROTRACTED LIBEL LITIGATION.

This Court has frequently noted the chilling effect of protracted libel litigation, emphasizing that legitimate reporting on important public issues inevitably will be chilled by "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, [and] even [by] fear of the expense involved in their defense" (*Time, Inc.* v. *Hill* (1967) 385 U.S. 374, 389). These concerns are not theoretical. Litigation is expensive, and the more protracted it is, the greater is the expense incurred and the burden visited upon the parties:

> "The high cost of litigation can be particularly burdensome to a media libel defendant, which, because it is in the business of making public statements, may also be put in the business of defending many of those statements in libel suits. Even short of going to trial, legal fees for a media defendant in a single case can easily run into five-figure numbers. Fees for a trial and an appeal, which often is required on a libel case, can become astronomical" (Smith, The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule (1983) 44 Mont.L.Rev. 71, 87) (footnotes omitted).[1]

The very real, and very costly, harassment occasioned by baseless libel suits is illustrated by Synanon's litigation against amicus RDA and others. As part and parcel of its policy of intimidation of all its critics (see Respondents' Brief in Opposition in No. 84-1304, pp. 2, 14), Synanon has announced to the world that, "[w]hen any news outlet gets out of line with us, we

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[1]It has been reported that defense costs exceeded half a million dollars in each of two recent libel cases (Garbus, "The Limits for Libel," N.Y. Times (7/29/83), p. A-23). And a libel case brought by retired Army officer Anthony Herbert based on a "60 Minutes" broadcast has cost over $4 million to defend during the last 11 years (Kaufman, Press, Privacy and Malice: Reflections on *New York v. Sullivan* [sic] (July 1984) 56 N.Y.St.B.J. 10, 14).

will do everything we can to punish it" (p. 792).[2] And that is precisely what Synanon repeatedly has done. In 1980, the National News Council noted that Synanon's use of protracted litigation had "created an atmosphere of apprehension" and was a "weapon for coercing the press into silence about Synanon and its affairs" (pp. 1184-1185). It concluded that "the public * * * is getting less news about Synanon than it otherwise would because of the chilling effect on editors of the organization's suit-threatening campaign" (p. 1186).

The extreme importance to the public of reports on organizations such as Synanon cannot be overestimated. According to its own frequent and vociferous declarations, Synanon performs important public "good works" in the area of rehabilitation of drug addicts and "character-disordered" persons. In his concurring opinion in *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, Chief Justice Warren noted the emergence in the private sector of groups and persons, such as Synanon, who fulfill roles once considered governmental (388 U.S. 163-164). Because they "often play an influential role in ordering society,"

> "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct" (388 U.S. 164).

Yet, Synanon's deliberate policy of coercion against the media was effective. Large newspapers and other media organizations remained silent about Synanon's misdeeds, and the job of exposure was left to a small weekly newspaper (with a circulation of 2,700), The Point Reyes Light. The Light's reports on Synanon galvanized local governmental action, and news reports by larger

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[2] Citations herein are to the record below in the *Synanon* case (No. 84-1304).

news organizations followed. Because of its "pioneering expose" of Synanon, the Light was awarded the Pulitzer Prize for "meritorious public service" (p. 603). In announcing the award, the Pulitzer Committee expressly noted that Synanon's litigation tactics had "effectively silenced" other news organizations (p. 603).

The award of the Pulitzer Prize brought other attention to the Light: massive litigation by Synanon against the Light's owners as well as against RDA for its article about the Pulitzer Prize award to the Light. This small newspaper felt the full brunt of Synanon's "punishment" for daring to speak out. The tremendous expense, and the chilling effect, of that litigation are shown by the record. As of February 1983 (when the RDA motion for summary judgment was argued before the trial court in the *Synanon* case), the defendants in that case had produced over 50,000 document pages. Amicus RDA itself had responded to four sets of written interrogatories, and its attorneys, paralegals and legal assistants had expended in excess of 4600 hours in defending the case. Synanon had deposed RDA personnel for 10 days and had taken 14 days of depositions of persons associated with the Light. On the day that the trial court denied RDA's motion for summary judgment, Synanon noticed *30 more* depositions of RDA personnel to continue for 53 consecutive weekdays thereafter (pp. 3287-3288, 3751-3752, 3292, 3294-3295).[3]

Thus, Synanon's deliberate use of litigation to "chill" the media is vividly illustrated here.[4] If such litigation *must* proceed

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[3] In a related case still pending in the California superior court (*Macy/ Burke, et al. v. Reader's Digest Association, Inc., et al.* (Marin County Superior Court No. 108266)), immediately following denial of a motion for summary judgment, Synanon noticed 14 depositions of RDA personnel, noticed, took or continued another 14 depositions of third parties, and announced its intention to conduct a *120-day* trial.

[4] The aggressive role of Synanon's legal department further emphasizes the in terrorem effect of its libel litigation (see *In re Sealed Case* (D.C.Cir. 1985) 754 F.2d 395, 397, 400-401; *Synanon Church v. United States* (D.D.C. 1984) 579 F.Supp. 967, 971-972).

to trial despite the plaintiff's inability to marshall evidence meeting the *New York Times* standard, then the constitutional guarantees will be rendered virtually ineffective.[5]

II. THE FIRST AMENDMENT APPLIES THROUGHOUT THE JUDICIAL PROCESS AND NOT SOLELY AT TRIAL.

A. The requirement of clear and convincing evidence of actual malice is a part of the substantive protection afforded by the First Amendment.

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[5] One commentator has noted other examples of the crippling effect that the high cost of libel defense has had, especially on smaller publications:

> "Libel litigation can be deadly to smaller and less financially secure organizations. * * *
>
> "The owners of the prize-winning *The Texas Observer* related the effects of a libel suit against that newspaper a few years ago. They discussed candidly how the suit forced them to spend all their energy on fund-raising activities to pay for the litigation while important stories, including a 'solid' one on illegal business practices in Dallas, went unreported.
>
> "The editor of the 6000 circulation *Gadsden County Times* of Quincy, Florida, recently discussed the suit against his newspaper by a state senator for stories reporting corporate fraud. He said that even though the insurance company has paid the legal fees, the drain on time and resources because of the suit has made him reluctant to write further investigative stories" (Smith, The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule, supra, 44 Mont.L.Rev. 88) (footnotes omitted).

Another example of self-censorship is provided by [MORE] magazine,

> "a small opinion journal, [which] reported that it had deleted much controversial material from an article for fear of litigation costs. Counsel for the magazine advised that, although [MORE] would likely prevail on the merits, the costs of a suit would bankrupt the magazine" (Note, Constitutional Law—Self-Censorship After *Herbert v. Lando*: The Need for Special Pre-trial Procedure in Defamation Action (1980) 58 N.C.L.Rev. 1025, 1035).

The *Liberty Lobby* decision is a startling departure from the rule in virtually every state[6] and federal jurisdiction[7] which has previously considered the issue. The Second Circuit has explained the generally accepted rule:

> "In a case where the defendant has moved for summary judgment on the issue of actual malice and the plaintiff claims that there remain material factual disputes, the court decides the materiality of the disputed facts by accepting the plaintiff's version and applying the actual malice standard. This standard requires a clear and convincing showing, which

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[6] E.g., *Tucci v. Guy Gannett Pub. Co.* (Me. 1983) 464 Atl.2d 161, 166; *Mark v. Seattle Times* (Wash. 1981) 635 P.2d 1081, 1088-1089, certiorari denied (1982) 457 U.S. 1124; *MacGuire v. Harriscope Broadcasting Co.* (Wyo. 1980) 612 P.2d 830, 839; *Dupler v. Mansfield Journal Co., Inc.* (Ohio 1980) 413 N.E.2d 1187, 1192, 1194, certiorari denied (1981) 452 U.S. 962; *Brophy v. Philadelphia Newspapers Inc.* (Pa.Super. 1980) 422 Atl.2d 625, 632; *Nader v. de Toledano* (D.C.App. 1979) 408 Atl.2d 31, 41-50, certiorari denied (1980) 444 U.S. 1078.

[7] E.g., *Brown v. Herald Co., Inc.* (8 Cir. 1983) 698 F.2d 949, 951 (per curiam); *Rebozo v. Washington Post Co.* (5 Cir. 1981) 637 F.2d 375, 381, certiorari denied (1981) 454 U.S. 964; *Steaks Unlimited, Inc. v. Deaner* (3 Cir. 1980) 623 F.2d 264, 275; *Arnheiter v. Random House, Inc.* (9 Cir. 1978) 578 F.2d 804, 805-806 (per curiam); *Fadell v. Minneapolis Star & Tribune Co., Inc.* (7 Cir. 1977) 557 F.2d 107, 108, certiorari denied (1977) 434 U.S. 966; *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael* (9 Cir. 1974) 492 F.2d 438, 439-441, certiorari denied (1974) 419 U.S. 872; *Herbert v. Lando* (S.D.N.Y. 1984) 596 F.Supp. 1178, 1188; *Prager v. American Broadcasting Cos., Inc.* (D.N.J. 1983) 569 F.Supp. 1229, 1239, affirmed (3 Cir. 1984) 734 F.2d 7; *National Rifle Ass'n v. Dayton Newspapers, Inc.* (S.D.Ohio 1983) 555 F.Supp. 1299, 1304; *Miss America Pageant, Inc. v. Penthouse Intern., Ltd.* (D.N.J. 1981) 524 F.Supp. 1280, 1282-1283; *Loeb v. New Times Communications Corp.* (S.D.N.Y. 1980) 497 F.Supp. 85, 94 n. 15. See also *Lorain Journal Co. v. Milkovich* (1980) 449 U.S. 966 n. 1 (Brennan, J., dissenting from denial of certiorari) (in both the directed verdict and summary judgment contexts "the court is called upon to answer the same question: whether there is sufficient evidence for the jury to find actual malice under the applicable 'clear and convincing evidence' burden of proof").

> may be by circumstantial evidence, of defendant's actual state of mind—either subjective awareness of probable falsity or actual intent to publish falsely. Therefore, a judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, 'a reasonable jury could find malice with convincing clarity' " (*Yiamouyiannis v. Consumers U. of United States* (2 Cir. 1980) 619 F.2d 932, 940, certiorari denied (1980) 449 U.S. 839) (emphasis deleted) (citation omitted).

This decision, and the numerous others in accord with it, correctly apply the *substantive* constitutional law which governs defamation actions brought by public figures. As this Court has emphasized, judges must "review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff" (*Time, Inc. v. Pape* (1971) 401 U.S. 279, 284). That review itself depends, in turn, on whether "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands" (*New York Times Co. v. Sullivan*, supra, 376 U.S. 285-286). This Court has continued to emphasize the constitutionally-mandated judicial role:

> "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice' " (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) ___ U.S. ___, 104 S.Ct. 1949, 1965).

This burden of proof is not simply a procedural rule to be applied during and after trial, but it is rather a substantive limitation on a public-figure plaintiff's right to recover (*New York Times v. Sullivan*, supra, 376 U.S. 283; *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 336-337, 342; see *Calder v. Jones* (1984) ___ U.S. ___, 104 S.Ct. 1482, 1488). The First Amendment does not just protect a defendant's exercise of its rights to speak and publish freely, but it also guarantees that suits which violate these rights are "beyond the reach" of state libel law (*New York Times Co. v. Sullivan*, supra, 376 U.S. 277).

Therefore, the substantive constitutional limitations on libel law must be applied at the summary judgment stage in order to make the constitutional protections effective. If a public-figure plaintiff may put a defendant to the expense, inconvenience and uncertainty of a full trial based on evidence which is less than that ultimately required by the Constitution, then the purpose of the substantive constitutional standard is defeated. Incorporation of the clear and convincing evidence standard into the summary judgment determination is the means by which courts minimize the chilling effect of libel litigation and simultaneously afford full First Amendment protection to individual defendants (*Reader's Digest Assn. v. Superior Court*, supra, 37 Cal.3d 252, 208 Cal. Rptr. 141, 690 P.2d 614).

B. No special procedural rules are applicable to libel cases.

The burden on a motion for summary judgment rests, of course, on the moving party. Under Rule 56(c) of the Federal Rules of Civil Procedure, the movant must establish that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In the context of an action governed by *New York Times*, this means that the moving defendant must demonstrate the nonexistence of "actual malice" in the constitutional sense; that is, the defendant must present admissible evidence showing the absence of any genuine issue of material fact regarding lack of knowledge of falsity or awareness of probable falsity. Only when the defendant makes a prima facie showing that no such genuine issue exists does the burden shift to the plaintiff to rebut that showing by submitting *some* evidence establishing that there is a genuine factual dispute on an issue material to the case.

Necessarily, the question whether there is an issue for trial upon which a jury could make the required factual findings will take into account the quantum of proof required in the case—here clear and convincing evidence of actual malice (see *Nader v. de Toledano*, supra, 408 Atl.2d 42; Schwarzer, Summary Judgment under the Federal Rules: Defining Genuine Issues of Fact (1983) 99 F.R.D. 465, 487-488). Where the *plaintiff* is the moving party, clear and convincing proof of actual malice must be shown on a motion for summary judgment; otherwise the movant could

prevail on summary judgment by a lower standard of proof than that required after a full trial (see *Beamer v. Nishiki* (Haw. 1983) 670 P.2d 1264, 1270). There is no logical reason why the substantive constitutional rule should not also apply when the public-figure plaintiff is the non-moving party.[8]

This does not mean that any "special" procedural rules apply at the summary judgment stage. To the contrary, as in all summary judgment motions, the trial judge must view the evidence most favorably to the plaintiff (see, e.g., *Rebozo v. Washington Post Co.*, supra, 637 F.2d 381; *Yiamouyiannis v. Consumers U. of United States*, supra, 619 F.2d 940; *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, supra, 492 F.2d 441; *Reader's Digest Assn. v. Superior Court*, supra, 37 Cal.3d 252, 208 Cal.Rptr. 141, 690 P.2d 614; *Tucci v. Guy Gannett Pub. Co.*, supra, 464 Atl.2d 166-167; *Nader v. de Toledano*, supra, 408 Atl.2d 50). The judge

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[8] Aside from questions of actual malice in libel cases, clear and convincing evidence is required in proof of a variety of legal issues, including, for instance, fraud and mistake sufficient to justify reformation of an instrument. In such contexts, the courts have not hesitated to incorporate the non-moving party's heavier burden of proof into the summary judgment determination. For instance, in *Lester v. Pickwick International, Inc.* (E.D.N.Y. 1981) 528 F.Supp. 1011, 1013, the court granted a defendant's motion for summary judgment in a fraud case because the "plaintiffs [could not] possibly present clear and convincing evidence of the requisite element of justifiable reliance." Similarly, a defendant is entitled to summary judgment on a statute of limitations defense, even over the plaintiff's claim that untimely filing of the complaint was induced by the defendant's fraud, unless the plaintiff can support his claim of fraud by clear and convincing evidence (see *Ciprut v. Moore* (E.D.Pa. 1981) 540 F.Supp. 817, 822, affirmed (3 Cir. 1982) 688 F.2d 819; *Whitley v. Hartford Acc. and Indem. Co.* (N.D.Tex. 1981) 532 F.Supp. 190, 196-197, affirmed (5 Cir. 1982) 670 F.2d 183). So, too, a plaintiff was granted summary judgment on a claim for breach of warranty under an agreement for payment of retirement benefits, over defendant's claim of good faith mistake in the agreement's calculation of benefits, partly because the defendant failed to produce clear and convincing evidence of mutual mistake (*Hoffa v. Fitzsimmons* (D.D.C. 1980) 499 F.Supp. 357, 362 n. 16), affirmed in part and vacated in part (D.C.Cir. 1982) 673 F.2d 1345).

is *not* to decide issues of credibility, deprive the plaintiff of reasonable inferences in his favor, or decide whether actual malice has been proved with convincing clarity (ibid.). The judge must decide only whether the plaintiff has produced *some* evidence which a reasonable jury could conclude is clear and convincing evidence of actual malice (ibid.).

Although the evidence is to be viewed in the light most favorable to the plaintiff, there is simply no reason why a more lenient standard should be adopted in assessing whether the evidence so viewed discloses a genuine issue of material fact for trial.[9] The *manner* of considering the evidence is the same as in any other summary judgment case. The point is that "[t]he *standard* against which the evidence must be examined is that of

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[9] Exactly what rule the *Liberty Lobby* court advocates in place of the rule applied by other courts is unclear. At one point in its opinion, the court describes the plaintiff's burden in opposing a summary judgment motion as establishing a "minimum of facts supporting the plaintiff's case" (746 F.2d 1570), which sounds suspiciously like a "scintilla of evidence" rule.

In another part of the opinion, the court endorses a statement in the concurring opinion in *Wasserman v. Time, Inc.* (D.C.Cir. 1970) 424 F.2d 920, 922, certiorari denied (1970) 398 U.S. 940 that,

> "[u]nless the court finds * * * that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant * * *" (746 F.2d 1571).

Since a plaintiff cannot prove "actual malice in the *Times* sense" in the absence of "clear and convincing proof of 'actual malice' " (*Bose Corp. v. Consumers Union of U.S., Inc.*, supra, 104 S.Ct. 1965), this would seem to be an endorsement, albeit unintentional, of the rule applied in other jurisdictions.

Finally, the court states that, in opposition to a motion for summary judgment, a plaintiff is required to present the "minimum amount of evidence that could persuade a reasonable person" on the issue of actual malice (746 F.2d 1571). Here, the opinion is totally confused. "Minimum" again sounds like a scintilla test. Yet, since a reasonable person could not find actual malice absent the clear and convincing evidence required by the constitutional test, the court once more appears to have unintentionally endorsed the rule applied by other courts.

New York Times and its progeny" (*Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael,* supra, 492 F.2d 441) (emphasis in original). Especially in a case in which the underlying facts are not in dispute, the question whether those facts can reasonably establish actual malice with convincing clarity is exactly the decision which this Court has required judges to make.

C. The rationale of the court below is ill founded, and its concerns are illusory.

The *Liberty Lobby* court advanced three arguments in support of its dictum regarding summary judgment: first, that a requirement of clear and convincing evidence of actual malice would compel the court to engage in "weighing" the facts at the summary judgment stage; second, that it would transform the summary judgment motion from a "relatively quick process" into a more extensive evidentiary proceeding; and third, that such a rule would not square with the statement in *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 120 n. 9, that "proof of 'actual malice' * * * does not readily lend itself to summary disposition."[10] The court is wrong on all counts.

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[10] The court also drew an inapt analogy to the criminal context, where, despite the government's ultimate burden of proving guilt beyond a reasonable doubt, a mere showing of "probable cause" at the preliminary hearing is sufficient to take the case to trial (746 F.2d 1570-1571). While it is true that the preliminary hearing in the criminal context and the summary judgment proceeding in the civil context have as one purpose the determination whether there is sufficient evidence to proceed to trial, the main focus, procedures, timing, and legal effect of the two proceedings make them altogether distinguishable. Thus, it is said that "the only legal justification for [the] existence [of the preliminary hearing] is to protect innocent persons from languishing in jail on totally baseless accusations" (*United States v. Mulligan* (6 Cir. 1975) 520 F.2d 1327, 1330, certiorari denied (1976) 424 U.S. 919). This issue of physical custody, totally lacking in the civil context, also influences the timing of the hearing: "[s]uch examination shall be held * * * not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody * * *" (Fed.Rules Crim.Proc., Rule 5(c)). Because the preliminary hearing is held at the very outset of the case, the prosecution cannot be expected to

The court's first two concerns—that a trial court would be required to "weigh" the evidence on a motion for summary judgment, and that plaintiff would have to "prove" his case to the motion judge—are both unfounded for the same reason: A public figure plaintiff need only demonstrate, and the court need only determine, that *some* evidence exists which can withstand the basic test of constitutional sufficiency. Thus, a public-figure plaintiff must only show some evidence which (with all reasonable inferences drawn in the plaintiff's favor) stands a reasonable chance of establishing the existence of actual malice under the clear and convincing standard:

> "The public figure plaintiff, to survive a motion for summary judgment, is not required to prove actual malice with convincing clarity *to the motion judge. Nader v. de Toledano, supra*, at 408 A.2d 49. Resolution of genuine issues of fact are for the jury. But where it appears that no reasonable jury could find actual malice with convincing clarity, the defendant is entitled to summary judgment" (*Herbert v. Lando*, supra, 596 F.Supp. 1188) (emphasis in original).

The plaintiff's burden to offer some evidence of a genuine issue as to actual malice does not even arise unless the defendant first submits affidavits or other proof sufficient to show that there is *no* such genuine issue. Otherwise, the plaintiff may prevail simply because the defendant's evidence is insufficient to foreclose the possibility of a genuine factual dispute.

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be able to present anything more than rudimentary evidence to support its ultimate burden of proof. Summary adjudication in civil cases, by contrast, usually occurs after discovery is well-advanced. Indeed, one purpose, or at least one practical effect, of the preliminary hearing is to afford the defendant some discovery of the prosecution's case against him (see *Coleman v. Alabama* (1970) 399 U.S. 1, 9), which is certainly not true of the summary judgment mechanism. A final distinction is that the summary judgment, if granted, is, of course, a summary and binding adjudication on the merits. A preliminary hearing, on the other hand, results in no judgment at all. A magistrate's decision that probable cause does not exist in no way "preclude[s] the government from instituting a subsequent prosecution for the same offense" (Fed.Rules Crim.Proc., Rule 5.1(b)).

Moreover, any concern about premature "trials" is answered by Rule 56(f) itself, which allows the court to deny a summary judgment motion if the non-moving party can show that the proof necessary to oppose the motion is for some reason unavailable. This rule will caution defendants against bringing such motions prematurely and will protect plaintiffs from the burden hypothesized by the court below. Indeed, in *Liberty Lobby*, discovery had already closed before the defendants' summary judgment motion was brought. In such cases, the perception that the plaintiff's case will be prejudiced by an early resolution of the actual malice issue is illusory. As the Second Circuit observed in *Yiamouyiannis*, supra, 619 F.2d 940, the summary resolution of the actual malice question should not give courts much pause when "the evidence * * * has been fully marshalled" by pretrial discovery and the parties "do not seek or suggest the need of further discovery."[11]

The court below also referred to footnote 9 in *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 120. This Court, however, has characterized footnote 9 as "implying" disapproval of the notion (expressed in some pre-*Hutchinson* cases) that different *procedural* rules apply to summary judgment motions in libel cases (*Calder v. Jones*, supra, 104 S.Ct. 1488). As demonstrated, application of the constitutional guarantees under the substantive law does *not* give libel defendants the advantage of a special procedural rule; rather, it is a neutral approach to summary judgment such as that employed in any other case.

Moreover, there are several reasons why the usual reluctance to determine "state of mind" issues summarily should not deter summary adjudication of the actual malice issue in libel cases. First, the concept of "actual malice," although it certainly has

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[11] To the extent that the court below was concerned with an increased burden on the courts through what it perceived to be a more extensive evidentiary proceeding on summary judgment (see 746 F.2d 1571), it seems self-evident that the summary resolution of such cases would be less burdensome than trying them. As a practical matter, although the plaintiff will be required to prepare its opposition to a summary judgment motion in light of the constitutional standard, the court itself is not required to treat the motion differently than in other cases. It must, as in all cases, evaluate the evidence against the applicable substantive law.

factual components and has been termed an "ultimate fact" by this Court (*Herbert v. Lando* (1979) 441 U.S. 153, 170), nevertheless is a term of art so fraught with legal limitations that it is a mixed question of fact and law (see *Bose Corp. v. Consumers Union of U.S., Inc.*, supra, 104 S.Ct. 1958-1967; Schwarzer, Summary Judgment Under The Federal Rules: Defining Genuine Issues of Material Fact (1983) 99 F.R.D. 465, 470-476). Because the Constitution limits the reach of state libel law, this Court has mandated that courts must review the entire record and independently assess the constitutional sufficiency of the evidence of actual malice rather than applying the ordinary "clearly erroneous" standard of review established by Rule 52 for purely factual matters (*Bose*, supra, 104 S.Ct. 1958-1965). Courts are likewise competent to enforce those constitutional limits on a motion for summary judgment without invading the province of the jury because such enforcement merely requires the application of a legal standard to the evidentiary facts (see Schwarzer, supra, 99 F.R.D. 470-476).

In addition, the term "actual malice" under *New York Times* does not refer to the common law conception of spite or ill-will, but rather to the defendant's knowledge of actual or probable falsity. Accordingly, the proof will usually depend primarily on documentary evidence, such as printed source material, tape recordings of interviews, research notes, inter-office memoranda and drafts of the article, or on the testimony of third parties, such as the sources interviewed for the allegedly libelous article (see, e.g., *Herbert v. Lando*, supra, 596 F.Supp. 1198-1208, 1211; *Fadell v. Minneapolis Star & Tribune Co., Inc.*, supra, 557 F.2d 109). Although the defendant's subjective state of mind is the ultimate issue, its proof will not, as with most other "state of mind" issues, rest exclusively within the defendant's control or depend solely on the defendant's own testimony.

Finally, as a practical matter, the issue of actual malice, as an "ultimate fact," often will be the only "fact" in dispute on summary judgment. The underlying facts as to the defendant's sources for the article, what information was provided by those sources, and which other available sources were not used, may well not be the subject of disagreement among the parties. In

such instances, the only issue will be whether, on those undisputed facts with all reasonable inferences drawn in the plaintiff's favor, a reasonable jury could determine that the defendant acted with actual malice. This is nothing more than the application of the constitutional standard to an established set of facts and, for this reason, it is particularly appropriate for the motion judge to decide whether the constitutional limits will be transgressed by allowing the litigation to proceed (see Schwarzer, supra, 99 F.R.D. 472-473).

CONCLUSION

For the foregoing reasons, the decision of the District of Columbia Circuit should be reversed.

Respectively submitted,

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No. 84-1602

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,
Petitioners,

vs.

LIBERTY LOBBY, INC. and WILLIS A. CARTO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS, AND BRIEF OF AMICI CURIAE THE SYNANON CHURCH AND CHARLES E. DEDERICH IN SUPPORT OF POSITION OF RESPONDENTS

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No. 84-1602

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,
Petitioners,

vs.

LIBERTY LOBBY, INC. and WILLIS A. CARTO,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

The Synanon Church and Mr. Charles E. Dederich hereby respectfully move for leave to file the attached brief *amici curiae* in this case.

The *amici* are petitioners in a libel case now pending before this Court on petition for writ of certiorari, entitled *The Synanon Church, et al. v. Reader's Digest Association, Inc. et al.*, No. 84-1304 (hereinafter, "*Synanon v. RDA*"). The issue of the proper standards to be applied in a motion for summary judgment in defamation cases is one of the issues specifically presented by *amici*'s petition. Resolution

of this issue could have a direct and immediate effect on *amici*'s petition and, therefore, *amici* have a real and continuing interest in the present case. For example, the decision of the California Supreme Court could be reversed based on a decision in this case. The relationship between the issue in the present case and the issues presented in *amici*'s petition is underscored by the fact that Reader's Digest Association, Inc., one of the respondents to *amici*'s petition, has submitted a motion for leave to file a brief of *amicus curiae* in this case. (It should be emphasized that while resolution of the issue in this case will resolve an important issue in *amici*'s case, any resolution of this case's issue will still leave what *amici* contend are many serious errors and confusions in the California Supreme Court decision in *Reader's Digest Assn. v. Superior Court*, 37 Cal.3d 244, 208 Cal.Rptr. 137, 690 P.2d 610 (1984). Therefore, *amici* submit that their petition for certiorari should be granted regardless of the outcome of this case.)

A second way in which petitioners have an interest in this matter arises from the various references made to *amici* in the briefs already filed in support of petitioners in this action. These briefs attempt to bolster their arguments by disparaging the character and good name of *amici*, including references such as "Synanon's deliberate use of litigation to 'chill' the media" (*Reader's Digest* Brief, p. 8) and the characterization of Synanon as filing defamation

actions "to stifle adverse comment" (Media *Amici* Brief, p. 26).[1] The allegations made about Synanon and Mr. Dederich are false and are frequently based upon unsubstantiated newspaper reports or no citation at all. To the extent that petitioners in this case are attempting to support their position by attacks on the character of *amici*, *amici* have a direct and real interest in having their points heard.

The facts and questions of law which *amici* wish to address focus on how petitioners and their supporters are asking for a new and extraordinarily high protection at the summary judgment stage, which has no justification and which will cause great difficulties. The attached brief corrects many of the erroneous factual and legal arguments of petitioners and their supporters. Blatant misstatements — as, for example, the false claim that there is "virtual unanimity" among the various jurisdictions regarding petitioners' proposed rule — demonstrate the fundamental errors of petitioners and their supporters in the media industry who wish to establish extraordinary rules favoring them as litigants.

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[1] The relevant petitions and briefs before this Court will be referred to herein as follows: Petition for Writ of Certiorari in *Synanon v. Reader's Digest Association, Inc.*, hereinafter "Synanon Pet. for Cert."; Brief for Petitioners, *Anderson v. Liberty Lobby*, hereinafter "Pet. Brief"; Brief of *Amicus Curiae*, the Reader's Digest Association, Inc., in Support of Petitioners, hereinafter "*Reader's Digest* Brief"; and, Brief *Amici Curiae* of American Newspaper Publishers Association, et al., hereinafter "Media *Amici* Brief."

For these reasons, The Synanon Church and Mr. Dederich respectfully request that this motion for leave to file a brief *amici curiae* be granted.

Respectfully submitted,

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BRIEF OF AMICI CURIAE THE SYNANON CHURCH AND CHARLES E. DEDERICH IN SUPPORT OF POSITION OF RESPONDENTS

This brief is respectfully submitted, pursuant to Rule 36 of the Rules of this Court, urging affirmance of the decision below of the United States Court of Appeals for the District of Columbia Circuit, on the grounds that (1) no special procedural rules are mandated at the summary judgment level in defamation cases by the First Amendment and (2) this Court should explicitly state that, as in other cases where state of mind is in issue, summary judgment is

a disfavored remedy to resolve a disputed issue of actual malice in a defamation case.[2]

SUMMARY OF ARGUMENT

Petitioners' position is in error because there is no constitutional mandate for a particular standard of proof at the summary judgment stage in a defamation action. This Court's decision in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), did not create such a rule, and subsequent decisions have stated that application of the *New York Times* requirements at pretrial stages would be an impermissible form of "double counting." Nothing in the First Amendment requires a clear and convincing evidence standard for resolving summary judgment motions in defamation actions.

In contrast, it is respectfully submitted that it is now necessary for this Court to hold explicitly what it has suggested in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Calder v. Jones*, __U.S__, 104 S.Ct. 1482 (1984): Summary judgment on the actual malice issue is a disfavored remedy, because issues of state of mind are generally unsuitable for summary disposition. The rights of defamation plaintiffs to clear their names make it essential that no new, extra constitutional hurdles be placed in their ability to take their cases to juries.

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[2] The abbreviations used herein for briefs are set forth in Footnote 1, *supra*, at p. 3.

ARGUMENT

I

THE STANDARD OF PROOF ON A MOTION FOR SUMMARY JUDGMENT IS NOT MANDATED BY THE FIRST AMENDMENT

Previous Analysis by This Court

The petitioners and *amici curiae* in support of petitioners misstate the question before the Court. The proper question raised from the decision in *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, __U.S.__, 105 S.Ct. 2672 (1985), is whether the First Amendment mandates the special procedural protection that a party opposing a motion for summary judgment in a libel case must prove the defendant's actual malice by clear and convincing evidence.

Petitioners assert that in defamation cases there should be a constitutional mandate under the First Amendment requiring the special procedural protection of a higher standard of proof in opposing a motion for summary judgment. Petitioners' position is unique. Even where a higher standard of proof than a preponderance of evidence is required at trial, the standard of proof in a motion for summary judgment in such cases is uniformly left to the individual jurisdictions.[3]

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[3] Petitioners and supporting *amici* have cited some cases in which various jurisdictions have elected to impose a heightened standard of proof at the summary judgment stage when a higher burden is required at trial. However, contrary to their repeated implications, this is far from a universal rule. Many jurisdictions do not impose a heightened

standard, as a few examples show. See, e.g., *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1360 (10th Cir. 1977) [while clear and convincing evidence is required to overcome the presumption that a deed is valid, "[w]hether the quantity and quality of evidence offered is sufficient to overcome such presumption is to us a matter which cannot be satisfactorily resolved by summary judgment"]; *Attorney General of the United States v. Irish People*, 595 F.Supp. 114, 116-117 (D.D.C. 1984) ["Plaintiff argues that because the application of FARA affects First Amendment rights, the government must make a compelling factual showing and establish its case by clear and convincing evidence. Although this argument might be appropriate in a discussion of proposed jury instructions, it has no place in the consideration of a motion for summary judgment."]; *J. C. Freeman v. Saxton*, 240 Ga. 309, 240 S.E.2d 708, 709 (1977) ["[q]uestions concerning the factual sufficiency of the evidence, i.e., whether the appellant has by clear and convincing evidence rebutted the presumption of gift and shown an implied trust, are for the jury"]; *Dugan v. First Nat. Bank in Wichita*, 227 Kan. 201, 606 P.2d 1009, 1014 (1980) ["[p]arty resisting a motion for summary judgment in an action based upon fraud need not present 'clear and convincing' evidence of fraud in opposing the motion."]; *Kline v. Clinton*, 103 Idaho 116, 645 P.2d 350, 355 (1982) ["While proof of an oral modification by clear and convincing evidence is the appropriate burden of proof at the trial of a matter, at the summary judgment stage the function of the trial court is not to weigh the evidence or to try the factual issues by whatever standard is appropriate to the case, but merely to determine whether or not there exists any genuine issue of material fact"]; *Collord v. Cooley*, 92 Idaho 789, 451 P.2d 535, 541 (1969) [Contention that summary judgment was properly granted because opposing parties failed to come forward with clear and convincing evidence "misconstrues the role of a summary judgment. The burden is upon the party moving for summary judgment . . . to establish that there is no genuine issue of material fact"]; *Credit Union of America v. Myers*, 234 Kan. 773, 676 P.2d 99, 106 (1984) ["The general rule is that fraud is never presumed and must be proven by clear and convincing evidence. [Citation] The trial court incorrectly applied the trial evidentiary standard to the motion for summary judgment"]; *Steadman v. Turner*, 84 N.M. 738, 507 P.2d 799, 801 (1973) ["Defendants confuse rules applicable to trials and rules applicable to

Amici in support of petitioners assert that application of the "clear and convincing" standard at the summary judgment stage in defamation actions is a matter of "virtual unanimity among the state and federal courts" (*Reader's Digest* Brief, p. 5). This is a misstatement of the law.

Indeed, the very authority cited by petitioners' *amici* belie their characterization of the "virtually unanimous" rule. In *Nader v. de Toledano*, 408 A.2d 31 (D.C. App. 1979), *cert. denied*, 444 U.S. 1078 (1980) (cited in Media *Amici* Brief, pp. 20-21, n. 15), the conflicts which exist concerning the standard of proof at summary judgment were carefully described and analyzed. The *Nader* court found that one line of cases, deriving from *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970), created a test which deviated from usual summary judgment procedure:

> First, rather than view this evidence in a light most favorable to the plaintiff, Judge Wright would have the trial judge evaluate all the evidence in its most reasonable light. Second, rather than ask whether a reasonable jury could find actual malice with convincing clarity, Judge Wright would require the trial judge to find actual

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summary judgments. At trial, the burden of establishing each element of fraud by clear and convincing evidence is upon plaintiffs" but no such requirement occurs at summary judgment]; *Floyd (J. L.) v. Industrial Development Board of City of Dothan*, 442 So.2d 927, 930 (Ala. 1983) [clear and convincing evidence is necessary at trial to prove abandonment by non-use, but plaintiff will survive motion for summary judgment by establishing genuine issue of material fact]; *Hibbs v. Chandler*, 684 S.W.2d 310, 312 (Ky. Ct. App. 1985) [while clear and convincing evidence is required at trial to prove paternity, such evidence is not required to survive motion for summary judgment].

> malice with convincing clarity if plaintiff is to survive a summary judgment attack. The *Wasserman* approach thus constitutes a two-prong departure from normal summary judgment law.
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> *Id.*, at 46.

The *Nader* court then decided that normal rules apply at summary judgment without constitutional concerns as to the standard of proof:

> We are unpersuaded by Judge Wright's two-prong approach or by other courts' variations upon it. We feel either prong of the *Wasserman* procedure—and perforce both prongs in conjunction—impermissibly denigrates the traditional roles of judge and jury. Furthermore, we glean from *New York Times* and subsequent decisions that the Court envisions normal function of the jury in libel actions as in other civil actions. [Citations] Thus, we are of the opinion that at summary judgment the plaintiff is not required to prove to the court "actual malice with convincing clarity" as he must do at trial because that would of necessity require a weighing of evidence by the court. We find no hint anywhere from the Supreme Court, that the judge must himself be convinced.
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> *Id.*, at 49. *Accord, Joseph v. Xerox Corp.*, 594 F.Supp. 330, 334, n. 5 (D.D.C. 1984).

Thus, the very case cited by media *amici* stands for the proposition opposite to their claim and, in fact, supports the holding of *Liberty Lobby*. Many other decisions show that the claim of petitioners is far from universally accepted.

Other courts have rendered decisions in accord with the decision in *Liberty Lobby*.[4]

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[4] See, also, *Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1212 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) ["ABC suggests that different rules and considerations apply to summary judgment motions in defamation cases. However, the standard for summary judgment motions is articulated clearly in Fed.R.Civ.P. 56(c). [¶] There is no rule which favors either granting or denying motions for summary judgment in defamation cases.' [Citations] Therefore, even in defamation cases, summary judgment is proper only if there exists no genuine issue as to any material fact."]; *Pace v. McGrath*, 378 F.Supp. 140, 144 (D.Md. 1974) [making distinction that convincing clarity is burden required at *trial*, not summary judgment]; *Berkey v. Delia*, 287 Md. 302, 413 A.2d 170, 185 (1980) [clear and convincing test rejected at summary judgment level; "[w]hether Delia adduces clear and convincing evidence to support his action against Berkey must be determined by the trier of fact who will weigh, compare, test, and judge its worth"]; *DiLorenzo v. New York News, Inc.*, 81 A.D.2d 844, 432 N.Y.S.2d 483, 484 (1980) ["Concern for the First Amendment should not be transformed into a requirement that the plaintiff prove actual malice to the motion court"]; *Dienes v. Associated Newspapers, Inc.*, 137 Mich. App. 272, 358 N.W.2d 562, 568 (1984) [at motion for summary judgment "[w]e decline to hold that any 'benefit of the doubt' must go to the media defendant nor do we hold that plaintiff must come forward with clear and convincing proof that a genuine issue of fact exists with regard to malice"]; *Community Medical Services of Clearfield, Inc. v. Local 2665, American Federation of State, County and Municipal Employees, AFL-CIO*, 437 A.2d 23, 27 (Pa. Super. Ct. 1981) ["The import of the Guam decision is that the usual procedural rules should govern summary judgment and that a libel plaintiff need not prove malice twice—first to the judge, then to the jury."]; *Collins v. Brigman*, 428 So.2d 373, 374 (Fla. Dist. Ct. App. 1983) ["In order for a litigant to avoid a summary judgment he does not have to 'demonstrate with clear and convincing evidence that there is a genuine issue as to any material fact,'—even in a public official defamation case."].

Another case heavily relied upon by petitioners and their supporters is *Yiamouyiannis v. Consumers U. of the United States*, 619 F.2d 932 (2d

The *Liberty Lobby* court and the many courts which have ruled similarly are correct. There is certainly no reference in the language of the First Amendment itself to the special procedural protection petitioners seek; there is no indication that the framers of the Constitution ever envisioned such a special procedural protection. There is no apparent indication in any decision of this Court that the clear and convincing evidence standard must be applied at any stage prior to submission to the jury. In fact, this Court's decisions indicate the opposite. This Court unanimously held last year that there are no First Amendment concerns whatsoever in determining whether a particular court has jurisdiction over a defendant in a defamation action. *Calder v. Jones*, ___U.S___, 104 S.Ct. 1482, 1487 (1984). There is no First Amendment bar to inquiring during the discovery phase of the litigation into the editorial processes and state of mind of persons involved in the publication. *Herbert v. Lando*, 441 U.S. 153, 176 (1979). This Court has never held that the standard of proof on any issues other than actual malice in a libel case has any constitutional implications at all, including the proof of falsity, innuendo, colloquium and the fact of publication. Recently, a plurality of this Court held that presumed and punitive damages are not constitutionally prohibited in certain cases involving private individuals. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ___U.S___, 105 S.Ct. 2939 (1985). This Court has never indicated that it is limiting a litigant's opportunity to have his case reach the jury.

Cir. 1980), *cert. denied*, 449 U.S. 839 (1980). However, a later decision characterized the portion relied upon as mere dictum which does not precisely set forth the rule on summary judgment motions in defamation cases. *Westmoreland v. CBS Inc.*, 596 F.Supp. 1170, 1179 (S.D.N.Y. 1984).

The new, extra protection which petitioners seek is a form of double counting, similar to that which has already been expressly rejected by this Court in a unanimous decision:

> Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. See, *e.g.*, *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) (no First Amendment privilege bars inquiry into editorial process). See also *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n. 9, 99 S.Ct. 2675, 2680 n. 9, 61 L.Ed.2d 411 (1979) (implying that no special rules apply for summary judgment).
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> *Calder v. Jones, supra*, 104 S.Ct. at 1488.

The approach that Synanon and Mr. Dederich are suggesting regarding this procedural question on summary judgment is similar to the approach taken by this Court in *Herbert v. Lando:*

> The plaintiff's burden is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and

> prove a false publication attended by some degree of culpability on the part of the publisher. If plaintiffs in consequence now resort to more discovery, it would not be surprising; and it would follow that the costs and other burdens of this kind of litigation would escalate and become much more troublesome for both plaintiffs and defendants. It is suggested that the press needs constitutional protection from these burdens if it is to perform its task, which is indispensable in a system such as ours.
>
> Creating a constitutional privilege foreclosing direct inquiry into the editorial process, however, would not cure this problem for the press. Only complete immunity from liability for defamation would effect this result, and the Court has regularly found this to be an untenable construction of the First Amendment. Furthermore, mushrooming litigation costs, much of it due to pretrial discovery, are not peculiar to the libel and slander area. There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus. But until and unless there are major changes in the present Rules of Civil Procedure, reliance must be had on what in fact and in law are ample powers of the district judge to prevent abuse.
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> *Herbert v. Lando, supra,* 441 U.S. at 176-177. (Footnote omitted.)

The argument that defamation defendants are entitled to a particular standard of review in determining motions for summary judgment presupposes that defamation

defendants have a constitutional right to seek summary judgment in the first place. No such right exists. A state is free to provide or eliminate the summary judgment as an available procedure. Since defamation defendants have no constitutional right to a motion for summary judgment, they likewise have no constitutional right to a particular standard on a motion for summary judgment.

In presenting their arguments, petitioners and *amici* raise three other arguments which deserve some response: their attack on libel plaintiffs, their equating summary judgment with a directed verdict, and their attempts to distinguish between the criminal and civil standards.

Attack on Libel Plaintiffs

Petitioners and supporting *amici* resort to attacks on the character of The Synanon Church and other libel plaintiffs. Their attacks are based entirely on newspaper reports and other matters not properly before this Court. However, this willingness to engage in exaggeration and outright falsification about Synanon underscores how much the media are seeking a special procedural rule for their benefit. For example, the media *amici* cite two *Newsweek* articles for their argument that a "major newspaper group," The Hearst Corporation, paid a substantial settlement to get rid of certain costly, time-consuming litigation. The clear implication is that Synanon's litigation against the Hearsts was meritless. The truth is that in 1976 the Synanon plaintiffs received a $600,000 settlement with a front-page retraction from the Hearsts in a libel case and in 1978 $2 million for various torts of the Hearsts and their attorneys, including the burgling of Mr. Dederich's personal offices. These payments were obviously not mere nuisance value settlements.

There are also references in the briefs to Synanon being a "violent" organization based upon language in certain judicial decisions. In none of these cases was any ultimate fact decided regarding this issue. In the one case, the court only noted that evidence of such violence had been introduced, but declined to reach this issue; in the other, the court was only considering the sufficiency of the government's *prima facie* showing to compel a grand jury witness' testimony based upon *in camera* exhibits submitted by the government. The interpretations of the cases by *amici* are gross distortions and, moreover, these characterizations and unsupported allegations are completely irrelevant to any issue before this Court.

The view of petitioners reflects a cynical view of the role of courts and juries. To accept their argument, one must assume that courts will not act to prevent useless and harassing litigation and that juries will not follow properly drafted legal instructions.[5]

Synanon is alleged to have conducted a campaign to harass the members of the media, but these reports were generated by either the media themselves or organizations financed by and supporting the media organizations. The entire point of the defamation action by Synanon and Mr. Dederich against *Reader's Digest* is the opportunity to clear the worldwide defamation suffered by them at the hands of *Reader's Digest* and other multi-million-dollar,

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[5] The media *amici* argue that the high reversal rate of libel verdicts indicates that increased use of summary judgment is required. (Media *Amici* Brief, p. 24.) Exactly the reverse is true. The high reversal rate of libel verdicts shows that the media is already receiving an extraordinary degree of protection greater than that enjoyed by other civil litigants. Again, the media's position is, in essence, that the protection afforded by *New York Times Company v. Sullivan* is not good enough.

international media conglomerates. These huge commercial media enterprises, whose major purpose is to increase profits by selling more stories, would have this Court create a virtually impenetrable barrier to Synanon's and Mr. Dederich's efforts to take their case to a jury.

Comparison to Directed Verdicts

Media *amici* argue that the clear and convincing evidence standard must be employed in summary judgment motions because such a standard is applied in directed verdict motions and the two are "functionally equivalent" (Media *Amici* Brief, pp. 6-10). This argument ignores certain well-established and crucial distinctions between the motion for summary judgment and the motion for directed verdict.

Professor Moore points out that a significant distinction between the motion for summary judgment and the motion for directed verdict is that the party moving for summary judgment has a higher burden:

> As to certain issues the motion for summary judgment does, however, operate differently than the motion for directed verdict, since the party moving for summary judgment has the burden of establishing the lack of any triable issue of material fact, even as to issues upon which the opposing party would have the burden of proof at trial. And since the motions operate differently in point of time—the motion for summary judgment to foreclose a trial, and the motion for directed verdict after the opposing party has had full opportunity to present his evidence in court—this

> factor may be considered in the exercise of sound judicial administration.
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> 6 J. Moore, *Moore's Federal Practice*, ¶ 56.23, 56-1393.

This distinction is crucial in the present case. At the time of a motion for directed verdict, after the evidence has been heard, it is proper to consider whether plaintiff has met his burden of establishing constitutional malice by clear and convincing evidence. Such is not the burden at the time of motion for summary judgment, where the burden is entirely upon the party moving for summary judgment, as the above-quoted language makes clear.

Another relevant distinction between the directed verdict motion and the summary judgment motion is that at the directed verdict stage it is proper for the trial judge to make credibility determinations:

> Yet a major difference between summary judgment and directed verdict is that credibility determinations may enter into the latter but not the former. Unlike a summary judgment motion, "a directed verdict motion typically would be made after the witness had testified and the court could take account of the possibility that he either could not be disbelieved or believed by the jury."
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> *Agosto v. Immigration & Naturalization Service*, 436 U.S. 748, 770, n. 8 (1978) (Powell, J., dissenting).

To the extent that *amici* argue that their conclusion is compelled by some "functional equivalence" between the motion for directed verdict and the motion for summary judgment, their contention is without merit.

Analogy to Criminal Cases

The analogy used in *Liberty Lobby* of the "clear and convincing" evidence standard in libel cases to the "beyond a reasonable doubt" constitutional standard in criminal cases and the application of those standards in pretrial proceedings is a proper one. This excellent analysis derives further support from the decisions of this Court. In addition to the premise that "probable cause" is sufficient to take a criminal case to trial, this Court has held, concerning the preliminary inquiry in the criminal context, that there are no constitutional necessities that require the application of the higher "beyond a reasonable doubt" standard when dealing with the question of pretrial incarceration of a criminal defendant. *Gerstein v. Pugh*, 420 U.S. 103, 121-122 (1975). In *Gerstein*, this Court held that, although guilt in a criminal case must be proved beyond a reasonable doubt, a finding of probable cause is all that is required under the Fourth Amendment to incarcerate a criminal defendant before trial. *Id.*

Why should libel defendants be afforded far greater pretrial protections than presumptively-innocent, individual citizens confronted with pretrial loss of liberty and the hardships and severe consequences of a criminal proceeding? In criminal cases, due process only requires a finding of "probable cause" before trial. Certainly, libel defendants, who face far less severe consequences in going to trial in a libel case, should not be afforded the protection of a higher standard of proof prior to trial.[6]

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[6] The media *amici* attempt to counter the analogy by suggesting that the criminal preliminary hearing occurs before the prosecutor has engaged in any discovery, while the motion for summary judgment follows discovery. This is meritless. Usually a prosecutor will have

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IT IS NOW URGENT FOR THIS COURT TO STATE CLEARLY AND UNEQUIVOCALLY THAT STATES HAVE A VALUABLE, RECOGNIZABLE INTEREST IN PROTECTING THE REPUTATIONS OF THEIR CITIZENS, THAT THERE IS CONSTITUTIONAL VALUE IN ALLOWING CITIZENS TO TAKE TRIABLE QUESTIONS OF ACTUAL MALICE TO A JURY, AND THAT MOTIONS FOR SUMMARY JUDGMENT IN LIBEL CASES ON THE ACTUAL MALICE QUESTION ARE GENERALLY DISFAVORED BECAUSE THEY CALL INTO QUESTION THE STATE OF MIND OF THE CENTRAL WITNESSES

It is respectfully submitted that this Court should now strongly hold that motions for summary judgment in libel cases on the actual malice question are to be treated in the same manner as other state-of-mind matters, and are therefore disfavored. This Court has provided excellent, clear explanations of the motion for summary judgment purpose and procedure which should be the standard in defamation cases:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except as to the

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completed his investigation before filing charges, and the prosecution typically conducts little or no discovery after the preliminary hearing.

> amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. Rules Civ. Proc., 28 U.S.C.A. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, • • • [and where] no genuine issue remains for trial • • • [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944).
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> *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962).

It is a well-established principle that questions of state of mind of a witness do not readily lend themselves to resolution by summary judgment. *Id.*, at 473. It is now time for this Court to articulate a clear recognition that state of mind issues are inherent in the *New York Times* test, and that these subjective tests require that summary judgments should be rare.

The right of plaintiffs to bring defamation suits to clear their reputation is a vital one. It is absolutely essential in our democracy that individuals, even those who risk speaking out against the established norm, be protected from irresponsible attacks by the media. People wronged by irresponsible media have a right to some recourse, and defamation actions are the only realistic recourse possible. It is imperative for this Court to prevent other courts from misreading the First Amendment to denigrate that right. The media's claim of a "chilling effect" from protracted litigation is baseless. In fact, the reverse is true. Defamation

plaintiffs are the ones who are "chilled." The enormous resources of media defendants are brought to bear against any who dare to sue them.[7] There are no signs that the instigation of litigation deters the media at all. For example, even after Synanon filed suit against Reader's Digest Association, Inc., *Reader's Digest* republished the article sued upon in its foreign editions (Synanon Pet. for Cert., pp. 22-23). In no way was *Reader's Digest* "chilled."

According to the cover of *Reader's Digest*, over 30 million copies are sold every month at a cover price of $1.25. The richest, most powerful parties in a libel suit are generally the defendants. Libel defendants are better able to insure against the costs and eventual judgments of their tortious conduct. Libel defendants in both the *Liberty Lobby* and *Synanon* cases are publishing for commercial, financial advantage. It is the libel defendant, not the plaintiff, that has the pecuniary interest; sensationalized stories sell the best. Therefore, this Court should act to protect the rights of citizens to seek redress for injury to their reputation and to have their legitimate claims reach a jury.

Unless this Court firmly states that summary judgments on the actual malice question are disfavored, defamation defendants will continue to make inroads on the legitimate rights of plaintiffs. The position of the petitioners would require a trial court to weigh evidence and test credibility on a motion for summary judgment in a libel case. As this Court cogently explained in *Addington v. Texas*, 441 U.S.

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[7] For example, in one slander case brought by Synanon against American Broadcasting Companies, Inc., two officers of Synanon were each subjected to over 30 days of deposition. Defamation defendants are renowned for imposing such oppressive discovery burdens.

418 (1979), the difference between clear and convincing evidence and a preponderance of evidence is one of degree, requiring a weighing process to distinguish:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring).
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> The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.
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> Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.
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> In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk

of error upon itself. This is accomplished by requiring under the Due Processs Clause that the state prove the guilt of an accused beyond a reasonable doubt. *In re Winship, supra.*

The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal," and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." [Citations] One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. [Citations]

Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies. Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be unknowable, given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of

> the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence. Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." [Citation] In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty." [Citation]
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> *Id.*, at 423-425.

As *Addington* teaches, the difference between "preponderance," "clear and convincing," and "beyond a reasonable doubt" is a matter of degree — a matter of how much weight the factfinder is to give to the evidence. Petitioners would have this Court interpret the First Amendment so as to require trial courts to drag into the motion for summary judgment procedure the debate as to what amount or type of evidence is sufficient to resolve a disputed question of material fact by clear and convincing evidence. That resolution requires a weighing of evidence and testing of credibility of witnesses, and is completely inconsistent with normal summary judgment procedures. Indeed, the rule urged by petitioners would require the trial court to grant a defamation defendant's motion for summary judgment even if a plaintiff comes forward with a preponderance of the evidence on the issue of actual malice.

A firm statement from this Court is required to counter the confusion created by petitioners and their supporters regarding the nature of the summary judgment inquiry. As conceded by *amici*, the elements of the inquiry are "that the

contested fact be material and that the dispute be genuine." (Media *Amici* Brief, p. 8.) Thus, the court has only two inquiries. The first is whether the allegedly disputed fact is material, i.e., whether resolution of the fact could prove or disprove an element of the case. The second inquiry is whether the dispute is genuine. This does not mean that the court needs to weigh the relative merits of the sides in the dispute; indeed, the trial court is forbidden to do so. The only inquiry properly before the trial court is whether or not the dispute is genuine.

If this Court does not use this opportunity to reject firmly the position urged by petitioners and their supporters, defamation defendants will continue to argue that summary judgment determinations in libel cases are a matter of federal constitutional law potentially subject to review by this Court. This Court would find it necessary to resolve repeatedly the meaning and scope of this new procedural right. For example, it would be essential for this Court to accept the *Synanon v. Reader's Digest Association* petition for certiorari to resolve what issues lower courts must consider in the "clear and convincing" evidence test and what weight should be given to evidence upon those issues. A striking example exists in the *Synanon* case, where the California Supreme Court minimized the dispute wherein *Reader's Digest's* sources deny saying that which the author claims they said (Synanon Pet. for Cert., pp. 23-24). If the clear and convincing evidence standard is not clearly rejected, courts will be required to wrestle with the weight to be given to the conflicting evidence, as the California Supreme Court did. There are many other examples. This Court would be called upon to resolve how much weight should be given to evidence that the defendant deleted pertinent facts that contradicted the defamation (Synanon Pet. for Cert., p. 19); evidence of predisposition to publish a

defamatory article (*Id.*, p. 20); evidence of failure to contact the subject of the story or persons associated with it (*Id.*, p. 21); evidence of failure to corroborate sources when the story did not constitute "hot news" *(Id.);* and evidence of publication of the defamation after receipt of a demand for retraction (*Id.*, p. 22). In the *Synanon* case, the evidence introduced in the summary judgment motion was considered sufficient by the trial judge to raise a triable issue of fact. The evidence was considered insufficient under the "favored remedy" approach taken by the California Supreme Court. Under petitioners' approach, this Court will ultimately have to decide how much weight should be given to such evidence and whether it meets the proposed new constitutional standard at the summary judgment stage.

A rule allowing courts to use a clear and convincing evidence standard at summary judgment will cause an extreme distortion of the discovery process. At a trial, a plaintiff can call a witness and confront him with all contradictions which may have been developed in the course of discovery. This is impossible to achieve in the discovery process itself, since witnesses deposed in the early stages of discovery cannot be confronted with later-developed facts. Actual malice can rarely be proven directly, since defendants will usually vouch for their own good faith. *Herbert v. Lando, supra,* 441 U.S. at 170. Therefore, it is usually essential for the plaintiff to establish actual malice by accumulated circumstantial evidence, which can be weighed against the defendant's denials. Such weighing is properly performed by a jury. Under petitioners' view, trial courts will be resolving factual disputes using an inadequate record, insufficient cross-examination, and extremely truncated and limited discovery. For example, in the *Synanon v. RDA* case, petitioners filed an affidavit

detailing eight depositions which were needed to oppose the motion for summary judgment; the California Supreme Court apparently did not find this affidavit in the file and concluded no need for further discovery had been shown. (Synanon Pet. for Cert., pp. 9-10, n. 8.) The trial court did not have to reach the discovery issue since it had denied the motion for summary judgment, but under the California Supreme Court's favored remedy and clear and convincing evidence standard, which caused the termination of the *Synanon v. RDA* libel suit, the question of whether Synanon and Mr. Dederich were unconstitutionally denied sufficient discovery is fundamental.

Moreover, a clear statement that libel summary judgments are disfavored will serve to keep this Court from being embroiled in other constitutional questions. For example, must trial and appellate courts cumulate inferences and circumstantial evidence to deny the motion for summary judgment, as in all other summary judgment proceedings? This issue is directly apparent from the *Synanon v. RDA* case (Synanon Pet. for Cert., pp. 17-19) and cries out for resolution therein if this Court were to allow for the clear and convincing evidence standard requested by petitioners in this case.

Thus, unless this Court gives a direct statement of the disfavored status of summary judgments on the actual malice issue, most perplexing constitutional matters are potentially raised, all of which are set forth in Synanon's petition in response to the California Supreme Court's position that summary judgment is a favored remedy.

A clear statement of this Court will unambiguously determine that defamation defendants are not entitled to special protections at the pretrial stage. Although

petitioners repeatedly claim they seek no special rules,[8] elsewhere they admit that special protection is indeed what they seek.[9]

In effect, petitioners' argument is that the Constitution requires the creation of a heavy presumption that libel defendants have not engaged in tortious conduct and that this heavy presumption must be adhered to at all stages of the proceedings to create unique hurdles for libel plaintiffs.

---

[8] Pet. Brief, pp. 8-9 [*Liberty Lobby* decision creates special rule disadvantaging libel defendants on summary judgment], p. 9 [neutral summary judgment rule implies no special protection for libel defendants], pp. 13-19 [normal summary judgment rules apply to libel cases]; *Reader's Digest* Brief, p. 5 [only normal summary judgment procedures apply], p. 12 [no special procedural rules apply at summary judgment stage of libel cases], p. 14 [the manner of considering the evidence is the same as in any other summary judgment case], p. 17 [neutral approach to summary judgment applies as in any other case]; Media *Amici* Brief, p. 3 [normal rules require that elevated standard of proof needed at trial must also apply at summary judgment], p. 16 [settled principles of summary judgment apply], p. 18 [*Hutchinson v. Proxmire, supra*, mandates application, in libel cases, of normal summary judgment procedures].

[9] In direct contradiction of the statements set forth in the preceding note, petitioners and their supporters repeatedly refer to the special protection necessary for libel defendants at summary judgment. See, e.g., Pet. Brief, p. 9 [special need for independent judicial scrutiny at summary judgment stage of public-figure libel cases], pp. 24-26 [constitutional question in libel cases is "of the most sensitive and delicate kind" and should not be left to the trier of fact]; *Reader's Digest* Brief, pp. 2, 6-8 [chilling effect of libel litigation mandates special constitutional protection at all stages of proceedings], p. 12 [substantive constitutional limitations on libel law must be applied at summary judgment in order to make constitutional protections effective]; Media *Amici* Brief, p. 3 [freedom of speech requires special protection at pretrial stage], p. 28 [First Amendment rights require application of heightened standard of proof at summary judgment].

Petitioners and their supporters argue that this is the conclusion mandated by *New York Times*.

The present case offers this Court an excellent opportunity, which it is respectfully submitted should be taken, to examine and modify the decision in *New York Times Company v. Sullivan*; however, such a drastic approach is not required, because *New York Times* does not mandate a clear and convincing evidence standard at the summary judgment stage. Instead, petitioners and their supporters should be denied the new, extraordinary protection which they are requesting, and it is further respectfully submitted that it is now urgent for this Court to issue a clear, unequivocal holding that summary judgments are disfavored on the actual malice issue in defamation cases.

CONCLUSION

For the foregoing reasons, the decision of the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3530 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, August 16, 1985, I served the within MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS, AND BRIEF OF AMICI CURIAE THE SYNANON CHURCH in re: "Jack Anderson vs. Liberty Lobby, Inc." in the U.S. Supreme Court, October Term, 1984, No. 84-1602;

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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LIBERTY LOBBY, INC., Fleming Lee, 300 Independence Avenue, Washington, D.C. 20003;

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All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on August 16, 1985

at Los Angeles, California.

Kathleen Kelly

Supreme Court, U.S.
FILED
AUG 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1602

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,
Petitioners,
v.
LIBERTY LOBBY, INC., and WILLIS A. CARTO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF AMICUS CURIAE THE AMERICAN LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, in order to deny a defendant's motion for summary judgment in a public figure libel action, the trial court judge must conclude that a reasonable jury not only could find the existence of actual malice, but could find that it had been established with convincing clarity.

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IN THE

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OCTOBER TERM, 1985

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF AMICUS CURIAE THE AMERICAN LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICUS CURIAE

The American Legal Foundation ("ALF" or "Foundation") is a national, non-profit, public interest legal center organized and existing under the laws of the District of Columbia for the purpose of articulating the broad public interest in courtroom litigation and administrative proceedings affecting the communications media. ALF currently represents the interests of over 40,000 supporters who reside throughout the United States. This brief is filed with the written consent of all parties, pursuant to Supreme Court Rule 36.1.

The Foundation is dedicated to ensuring that the media act in a fair and responsible manner in reporting news and information to the public. In this regard, ALF has directed much of its media litigation efforts to challenging inaccurate news broadcasts and to assisting individuals defamed by the media.

For example, ALF has prosecuted a variety of administrative complaints at the Federal Communications Commission seeking sanctions against government-licensed broadcasters who air false, defamatory or otherwise distorted news reports that deceive the viewing public. *See, e.g., In re Complaint of American Legal Foundation v. Columbia Broadcasting System, Inc.*, FCC File No. Cl-515, *Application for Review by the Full Commisison filed*, March 4, 1985 (presenting evidence to the Commission demonstrating that the CBS documentary, "The Uncounted Enemy: A Vietnam Deception," deliberately distorted and suppressed information in order to create the false impression that General William C. Westmoreland led a conspiracy to falsify enemy troop numbers during the Vietnam War); and *In re Complaint of American Legal Foundation/Central Intelligence Agency v. American Broadcasting Company, Inc., Report* No. MM-53, *Request for Full Commission Review denied*, July 12, 1985 (involving fairness doctrine/news distortion complaints filed in connection with "ABC World News Tonight" segments falsely alleging CIA participation in unlawful schemes to assassinate American citizens).

Over the past three years, ALF has also increasingly turned its attention to libel litigation as one major aspect of its media fairness agenda. The Foundation has been involved in a number of important libel suits in differing capacities (co-counsel, of counsel, *amicus curiae*). These include: *Galloway v. CBS, Inc.*, No. C 345900 (L.A. Super. 1983) (private figure action against "60 Minutes" news program concerning report on medical insurance

fraud); *Tavoulareas v. Washington Post*, No. 83-1605 (D.C. Cir. Apr. 9, 1985), *reh'g en banc granted* (June 11, 1985) (business executive's suit over newspaper's allegations of financial mismanagement and corporate nepotism); *Janklow v. Viking Press, et al.*, No. 14657, *argued* Jan. 9, 1985 (S.Ct. S.D.) (suit by South Dakota Governor raising neutral reportage privilege); and *Lewis, et al. v. Port Packet*, 325 S.E.2d 713 (Va. 1985), *petition for cert. denied*, 53 U.S.L.W. 3911 (U.S. July 1, 1985) No. 84-1723 (private figure libel action concerning standard of proof prerequisite to punitive damage award).

In addition to the Foundation's regular participation in libel litigation, ALF has also established the nation's only existing Libel Prosecution Resource Center to assist victims of media defamation in suits against the press. Postell, *News Media Under Scrutiny in the '80s*, Trial Magazine, February, 1985 at 72-73. The Center, which began operation in August, 1984, offers a collection of sample briefs, complaints and other types of libel-related pleadings and materials to interested individuals. In addition to serving as a libel information clearinghouse, the ALF Center has also published original legal studies on various aspects of defamation law. *See* B. Fein, New York Times v. Sullivan: *An Obstacle to Enlightened Public Discourse and Government Responsiveness to the People* (American Legal Foundation, No. 1, 1984).

Finally, working through its Libel Center, ALF has succeeded in organizing a network of libel plaintiffs' attorneys in approximately 40 states who accept referrals from the Foundation when requests for legal assistance are received by potential libel plaintiffs situated in their locality.

Thus ALF's expertise in libel law is well documented. The Foundation has expended an enormous amount of time, effort and money to assist libel plaintiffs in the belief that the public interest is ill served by a legal

system that effectively renders both private and public figures powerless to protect their good names against unjust media defamation.

The constitutional issues presented in the instant proceeding directly implicate these concerns. Simply stated, petitioners seek to deprive public figure libel plaintiffs of the right to have their cases decided by a jury. They seek to do this by urging this Court to introduce the "clear and convincing evidence" constitutional standard of proof at the summary judgment stage of litigation—the result of which would be effectively to replace trial by jury with "trial by affidavits." *Cf., Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (Black, J., concurring).

No matter how they attempt to present it, petitioners' arguments, if adopted, would constitute an unjustified restructuring of the summary judgment procedure normally available to litigants in civil cases. Public figure libel plaintiffs would henceforth be compelled to try their entire case in pretrial affidavits and depositions with little, if any, hope of eventually getting to trial. Moreover, trial court judges would be vested with a constitutional prerogative to assume traditional jury functions on the basis of little more than speculative claims of "chilling effect".

The central fact to be recognized is that petitioners are arguing for the establishment of special procedural protections in public figure libel cases in addition to already existing substantive constitutional protections mandated by *New York Times v. Sullivan* and its progeny. However, by shielding the media any further from liability—or in this case, the mere threat of potential liability—for either recklessly or intentionally disseminating false and defamatory factual information about public figures, the Court would, in fact, be granting the communications media absolute immunity from suit.

Although the First Amendment concerns to be addressed in this case are important, so too are the conflicting reputational interests. Petitioners and their eighteen supporting amici have come before this Court to stress the latter at the expense of the former. By articulating why the public interest demands heightened judicial concern for the value of an individual's reputation, ALF hopes to redress this argumentative imbalance and thereby assist the Court in reaching an informed judgment in the specific matter *sub judice*.

Accordingly, the American Legal Foundation believes it is urgently important for this Court to affirm the holding of the United States Court of Appeals for the District of Columbia that it is inappropriate to apply the clear and convincing evidence standard at the summary judgment stage of a public figure libel action.

STATEMENT OF THE CASE

In the interests of brevity, *amicus curiae* adopts the statement of the case set forth in the brief of Respondents.

SUMMARY OF ARGUMENT

1. An unbroken line of judicial precedents has firmly established that summary judgment is a drastic procedural remedy which should not be employed by courts to deprive litigants of their Seventh Amendment right to trial by jury when material facts are in dispute. In this regard courts must scrupulously avoid assuming the jury function by, for example, weighing the materiality of the facts in dispute.

When cases arise centering around state of mind determinations summary judgment should be even more sparingly employed. State of mind issues are best resolved by the finder of fact, that is, the jury. Given that a public figure libel action must inevitably focus on the

state of mind of the libel defendants in order to satisfy the constituional requirements for liability articulated by this Court in *New York Times v. Sullivan*, such actions are all the more inappropriate for resolution on a motion for summary judgment.

2. Petitioners' theory of *New York Times v. Sullivan* would entail extending the already considerable substantive protections afforded libel defendants into the procedural summary judgment process of determining whether material facts are in dispute. This is patently incompatible with recent prior decisions of this Court to the effect that the constitutional guarantees embodied in First Amendment are to be given no weight in these kinds of purely procedural matters.

3. A number of important public interest considerations support the decision reached by the Court of Appeals. These include allowing public figures to have continued access to a jury trial so that they may freely engage in discussions about issues of public importance, and act to vindicate their reputations when unjustly defamed.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY HELD THAT IT IS INAPPROPRIATE FOR A TRIAL JUDGE TO APPLY THE CLEAR AND CONVINCING EVIDENCE CONSTITUTIONAL STANDARD AT THE SUMMARY JUDGMENT STAGE OF A PUBLIC FIGURE LIBEL ACTION

This case concerns the important legal issue of whether, in order to deny a defendant's motion for summary judgment in a public figure libel trial, a trial court judge is constitutionally compelled to conclude, not only that a reasonable jury could find the existence of actual malice, but that it could also find that the plaintiff had established actual malice with convincing clarity. As a practical matter, the question presented is much simpler: whether public figure libel plaintiffs seeking to redress perceived injury to their good names will remain entitled to have their claims fully adjudicated, where genuine factual disputes exist, by a jury. At a time when, owing to the substantive protections already afforded media defendants, the success rate for libel plaintiffs has been reduced to an abysmally low 5 to 10 percent (thereby making it the worst of all areas of personal injury law in which to litigate), failure to affirm to Court of Appeals ruling would strike a fatal blow to the already severely limited ability of public figures to vindicate their reputations. *See* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 Univ. San. Fran. L. Rev. 1, 4-5 (1983).

Traditionally, where facts have been found to be in dispute, courts have not hesitated to deny applications for summary judgment. In such instances, the summary judgment procedure has consistently and properly been viewed as infringing the Seventh Amendment right to trial by jury.[1] Adoption of Rule 56 of the Federal Rules of Proce-

[1] The Seventh Amendment provides in pertinent part that "the right of trial by jury shall be preserved."

dure has in no way altered judicial reluctance to constrict a party's right to have factually disputed issues resolved by a jury.

Judicial concern that trial by jury should not be replaced by "trial by affidavit" has been particularly acute in three key situations: (1) when the case involves questions of motive, intent or other states of mind; (2) when the credibility of the movant is attacked; and (3) when the moving party is in exclusive possession of the relevant facts.

Historically, these three situations frequently recur in libel litigation. Moreover, this Court's adoption of the actual malice standard of proof in *New York Times v. Sullivan* ensured that henceforth public figure libel litigation would necessarily involve searching examinations of a libel defendant's subjective state of mind. *Herbert v. Lando*, 441 U.S. 153 (1979).

Despite traditional judicial reluctance to grant summary judgment in cases involving state of mind determinations, the granting of summary judgments in post-*Sullivan* libel cases paradoxically soon came to be described as "the rule" rather than the exception. As a result, this Court felt constrained to remind the lower courts that libel cases were peculiarly suited to resolution through trial by jury. *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

Yet, despite the Court's clear admonishment, statistics confirm that judicial receptivity to summary disposition of libel actions continues unabated. *See, e.g.*, Libel Defense Resource Center, Study No. 6, Bulletin No. 12 (Dec. 31, 1984). The explanation for this phenomenon appears to be twofold: (1) a lingering concern that special summary procedures are necessary where first amendment values are implicated; and (2) the unthinking assumption that the substantive protections articulated in *New York Times* must automatically be extended to the summary judgment stage of public figure libel litigation.

The petitioners and their supporting amici now present these same two concerns. They call upon the Court to accept, and thereby institutionalize, the aberrant practice that has developed in the lower state and federal judiciary of blithely awarding summary judgments to media defendants. But neither tradition, past decisions of this Court, nor common sense support granting such sweeping procedural protections to libel defendants.

A. Summary Judgment Is Properly Regarded As A Procedural Remedy For Disposing Of Claims Which Should Be Sparingly Employed In Order To Avoid Depriving Litigants Of Their Seventh Amendment Right To A Jury Trial When Material Facts Are In Dispute

The summary judgment process outlined in Rule 56 of the Federal Rules of Civil Procedure has been described as being "a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact." 6 Moore's Federal Practice, para. 56.04 at 56-63 (2d ed. 1985). It provides that the trial court judge shall grant summary judgment if he finds there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The summary judgment rule serves a number of important functions. These include the avoidance of both costly trials, when only questions of law exist, as well as the danger that vexatious litigation may be used to coerce settlements. 10 C. Wright & A. Miller, *Federal Practice and Procedure*, Section 2712 at 370-77 (1973).

While the proper application of summary judgment operates to decide legal complaints efficiently by preventing unnecessary cases from going to trial, courts have been cautious in invoking it. Indeed, summary judgment has properly been classified as a "drastic remedy" to be sparingly employed, *Barber v. General Elec. Co.*, 648 F.2d

1272, 1276 n.1 (10th Cir. 1981); a "tool . . . as dangerous as it is valuable," *Applegate v. Top Assocs.*, 425 F.2d 92, 96 (2d Cir. 1980); and "a lethal weapon [of which] courts must . . . beware of overkill in its use." *Brunswick Corp. v. Vineberg*, 378 F.2d 605, 612 (5th Cir. 1967).

Once a motion for summary judgment is made the court must examine the record that exists at that preliminary point in the litigation in the light most favorable to the non-moving party in order to determine whether there are factual issues to be tried. 10 C. Wright & A. Miller, *supra*, Section 2727, at 524-28 (1973). If disputes over genuine issues of material fact are found to exist, the court must deny the motion. It cannot try issues of fact on the summary judgment motion as that would constitute an invasion of the jury's province. *See, e.g., Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434, 438 (3d Cir. 1973) (jury is allocated the task of weighing the contradictory evidence and inferences, of judging witness credibility, and of drawing ultimate conclusions as to questions of fact).

Judicial reluctance to involve Rule 56 derives from a justified fear of depriving litigants of their constitutional right under the Seventh Amendment to a jury trial. This Court, in particular, has repeatedly inveighed against using summary judgment procedures to cut off the right to jury trial when genuine issues of fact remain to be tried.

Thus, for example, in *Associated Press v. United States*, 326 U.S. 1, 6 (1945) the Court remarked: "We agree that Rule 56 should be cautiously invoked to the end that the parties may *always* be afforded a trial where there is a bona fide dispute of facts between them." (Emphasis added.)

An even stronger warning issued several years later in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962):

> It is only when the witnesses are present and subject to cross-examination that the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which for so long has been the hall-mark of "even handed justice".

Cf., Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 621-622 (1973) ("If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment. . . .")

Clearly, then, the function of a trial court judge is circumscribed when considering a motion for summary judgment. Given that the nonmovant's Seventh Amendment right to a jury trial hangs in the balance, he must first examine the preliminary record that has been established in the light most favorable to the non-moving party. If a genuine issue of material fact is then found to exist, the motion must be denied and the case allowed to go to trial.

B. Summary Judgment Is Particularly Inappropriate For Resolution Of Cases Involving States of Mind

If, in the normal course of civil litigation, summary judgment is to be sparingly used, this is particularly true of cases which center around a party's state of mind. *See*, The Advisory Committee's Notes to Rule 56(e).

Causes of action which call into question a party's state of mind obviously involve an assessment of witness credibility. This, in turn, normally requires that the case be allowed to proceed to trial where the jury, by observing direct and cross-examination, will be able to assess properly that party's credibility. *Agosto v. INS*, 436 U.S. 748, 756 (1978) (it is solely within the purview of the jury to make a determination of credibility; a trial court may not grant summary judgment on its assessment of credibility.)

In other words, state of mind cases present questions of fact not susceptible to resolution at the summary judg-

ment stage where the record will consist entirely of pleadings, affidavits and other written documents. *Cf.*, 10 C. Wright & A. Miller, *supra*, Section 2726 at 524: Because "determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ—a function traditionally left to the jury—summary judgment often will be an inappropriate means of resolving an issue of this character." *Consolidated Elec. Co. v. United States*, 355 F.2d 437, 438 (9th Cir. 1966) ("when an issue requires determination of state of mind it is unusual that disposition may be made by summary judgment.")

This Court has similarly expressed an equally restrictive view of the appropriateness of granting summary judgment in state of mind cases. In *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401 (1899), a directed verdict case, the Court examined issues involving fraudulent intent. Because of the fundamental problem of witness credibility that was presented, it remarked:

> It may be said in general that there is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud. . . . [I]t is rarely safe to withdraw the question from the jury.

In *Poller v. CBS*, 368 U.S. 464 (1962), an antitrust case, the Court again reiterated this view:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Sonnentheil and *Poller* clearly stand for the proposition that summary judgment is improperly invoked in cases involving state of mind or where the facts in dispute are

particularly within the knowledge of the moving party. The reasons for this have been succinctly summed up by one commentator:

> Where a case is tried by affidavit and deposition, demeanor evidence is lost. The affiant, who in an ex parte affidavit may give a self-serving factual account, might under the formal pressures of trial be compelled to relate the truth. When summary judgment is granted this chance is lost.

Comment, *The Use of Summary Judgments in Defamation Cases*, 14 Univ. San Fran. L. Rev. 77, 84-85 (1979).

C. A Public Figure Libel Action Necessarily Requires A Searching Examination Into The Defendant's State Of Mind And Is Therefore An Inappropriate Area Of The Law For Summary Disposition

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court handed libel defendants "unquestionably the greatest victory won by defendants in the modern history of the law of torts," [2] when it held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckeless disregard of whether it was false or not.

Id., at 279-80.

In addition to requiring a showing of actual malice, the Court also declared that this showing must be made with "convincing clarity" in order to sustain a finding of liability. 376 U.S. at 285-86. Both of these burdens, "actual malice," supported by "clear and convincing" evidence, were subsequently extended to public figure libel

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[2] W. Prosser, Handbook of the Law of Torts, Section 118, at 819 (4th ed. 1971).

plaintiffs. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Because the actual malice standard calls into question the libel defendant's subjective attitude toward the truth or falsity of the published defamatory materials, it is clear that a public figure libel action centers upon that defendant's state of mind. *Herbert v. Lando*, 441 U.S. 153 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

In general, therefore, one would expect that consideration of a motion for summary judgment in the context of a public figure libel case involving the actual malice standard to be no different from any other type of civil litigation raising state of mind issues. Once the motion had been made, the court would examine the existing paper record in the light most favorable to the non-moving party, normally the public figure libel plaintiff. If genuine issues of material fact were found to be in dispute the case would be allowed to proceed to trial.

For the purposes of deciding what would be a disputed "material" fact in such a case, recourse would be had to the actual malice standard. Stated somewhat differently, any disputed fact determinative or bearing upon the question of whether the libel defendant "in fact, entertained serious doubts as to the truth of his publication" would be material. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The trial court would not, however, seek to assess or evaluate the weight of those disputed facts by, for example, determining if actual malice had been demonstrated with convincing clarity; that task would properly be left to the jury. Moreover, in light of the fact that in complex libel cases, as in complex antitrust cases, "motive and intent play leading roles, the proof is largely in the hands of the [defendants] and hostile witnesses thicken the plot," the court should be favorably predisposed to allowing the case to proceed to

trial. *Poller v. CBS*, 368 U.S. 464 (1962); *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

This is precisely the approach adopted by the Court of Appeals in the instant case. The lower court concluded that petitioners' motion for summary judgment should be denied because it found that: (1) the record disclosed material facts in dispute; and (2) a jury could reasonably conclude that nine of the thirty allegations contained in respondents' original complaint were defamatory false and made with actual malice. The lower court properly refused to invoke the clear and convincing evidence standard to evaluate the proof of actual malice. To do so, it correctly explained:

> would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts. . . . It would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions . . . .

Liberty Lobby v. Anderson, 746 F.2d 1563, 1570 (D.C. Cir. 1984).

In short, the appellate court's concerns were the same as those expressed in the past by this Court regarding the use of summary judgment: that it should not be used as a means of replacing "trial by jury" with "trial by affidavit." Accordingly, the appellate court's decision should be affirmed.

D. Application Of The Clear And Convincing Evidence Standard At The Summary Judgment Stage Would Contravene This Court's Express Intent That No Special Procedural Protections Be Afforded Libel Defendants

Petitioners attempt to disguise the true nature of the extraordinary arguments they make by cloaking them in the familiar garb of *New York Times v. Sullivan*. Thus they begin with the well-settled proposition that a public

figure libel plaintiff must be able to demonstrate actual malice with convincing clarity in order to recover monetary damages at trial. Pet's Br. at 10-11.

From this, they next contend that the clear and convincing evidence requirement of actual malice mandated by *New York Times v. Sullivan* applies not only when the jury is actually conducting its deliberations but also when, at the close of the plaintiff's case, a motion for directed verdict is made under Rule 50. Pet's Br. at 12-13. Once again, this proposition is unassailable and was even recognized by the Court of Appeals. *Liberty Lobby v. Anderson*, 746 F.2d at 1571, *citing Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970).

However, petitioners then use these two principles to bolster the untenable claim that because the standard for summary judgment is similar to that for a directed verdict, the clear and convincing evidence standard also applies at the summary judgment stage. Pet. Br. at 13-16.

In contrast to petitioners novel and farfetched extension of the clear and convincing evidence standard, the actual jurisprudence reflects a recognition that it is improper for courts to usurp the prerogative of the jury by weighing evidence at the summary judgment stage. *See, e.g., Guam Federation of Teachers, Local 1581 v. Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974); *Taggart v. Wadleigh-Maurice, Ltd.*, 489 F.2d 434 (3rd. Cir. 1973); *Kridler v. Bituminous Gas Corp.*, 409 F.2d 88, 91 (5th Cir. 1969); *M. C. Carlisle & Co. v. Cross*, 386 F.2d 672, 675 (1st Cir. 1967); *Monsanto Chem. Co. v. Payne*, 354 F.2d 965, 968 (5th Cir. 1966).

While a motion for summary judgment may be similar to a motion for directed verdict in that both seek to remove from the fact finder those cases in which there is no genuine controversy, such an indiscriminate view glosses over important differences. The motion for sum-

mary judgment is made at an early stage in the litigation when the record is not well developed. A directed verdict, on the other hand comes near the end of the case when the factual record is complete. The substantial difference in the development of the record is what makes it entirely appropriate for the trial judge to apply the substantive law at the directed verdict stage. The summary judgment stage however is entirely procedural. In fact Rule 56 says nothing about standards of proof at all. It is concerned purely with determining if there are material facts in dispute.

In *Calder v. Jones*, 104 S.Ct. 1482, 1488 (1984) this Court, acting unanimously, made clear its position about allowing "invisible radiations" from the First Amendment to impermissibly affect normal procedural mechanisms such as summary judgment:

> Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. *See, e.g., Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) (no First Amendment privilege bars inquiry into editorial process). *See also Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9, 99 S.Ct. 2675, 2680 n.9, 61 L.Ed.2d 411 (1979) (implying that no special rules apply for summary judgment).

II. IMPORTANT PUBLIC POLICY CONSIDERATIONS MILITATE AGAINST APPLYING THE CLEAR AND CONVINCING EVIDENCE STANDARD AT THE SUMMARY JUDGMENT STAGE OF A PUBLIC FIGURE LIBEL ACTION

Petitioners and their supporting amici contend that application of the clear and convincing evidence standard at the summary judgment stage would be in the public interest as it would prevent the alleged "chilling effect" on the media that they say the mere pendency of libel litigation poses. *See, e.g.*, Brief *Amicus Curiae* of American Newspaper Publishers Association, *et al.* at 21-28. They further argue that the adoption of such an extraordinary burden at this preliminary stage would be a means by which courts could prevent media harassment through the filing of meritless libel suits. *Id.*

However, no hard empirical evidence has been presented to the Court in support of these speculative contentions. Indeed as one commentator accurately noted: "Undoubtedly the term 'chilling effect' has been overused. . . . There is no conclusive evidence that the varying judicial interpretations of defamation have critically influenced editorial coverage of events and persons." Frakt, *Defamation Since* Gertz v. Robert Welch, Inc.: The *Emerging Common Law*, 10 Rut-Cam L.J. 519, 560 (1979). Moreover, courts are currently capable of employing much less sweeping devices to control and punish vexation litigation. For example, courts may impose sanctions for the filing of frivolous complaints and are also empowered to award attorneys fees and court costs for such harassing conduct. *See, e.g., F.D. Rich Co. v. United States* ex rel. *Industrial Lumber Co.*, 417 U.S. 116, 129 (1979).

Finally it is by no means clear that libel litigants are using this cause of action to harass or intimidate. A recently released study of all reported libel cases from 1974

to 1984 flatly concluded that: "libel plaintiffs are not litigious, for most plaintiffs this is the first time they have filed suit." Bezanson, Cranberg & Soloski, *Libel and the Press: Setting the Record Straight*, Silha Center for the Study of Media Ethics and Law (May 15, 1985). Portions of this study are reproduced in Appendix A to this brief. *See*, specifically, Appendix A at 8a.

Indeed, *amicus* believes that if this Court carefully weighs all the competing issues raised in this appeal it will conclude that the public interest dictates a conclusion entirely opposite from that propounded by petitioners. Incorporation of the clear and convincing evidence standard into the summary judgment phase of a public figure libel trial will effectively afford media defendants an absolute immunity to suit. It will concommittantly work to deprive a public figure libel plaintiff of the opportunity to secure even a partial vindication of his reputation when information has been published that is both false and defamatory, but not motivated by actual malice. Finally, imposing on the plaintiff the burden of establishing his case by clear and convincing evidence will disserve the public interest by deterring individuals from involving themselves either in government or from speaking out concerning matters of public interest and concern.

A. Application By Trial Judges Of The Clear And Convincing Evidence Standard At The Summary Judgment Stage Would Effectively Afford Defendants An Absolute Immunity To Suits By Public Figures Libel Plaintiffs

In *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979),[3] this Court examined and challenged the then-

[3] Petitioners consistently denounce the *Hutchinson* footnote as being mere dictum. But, as this Court is well aware, even dicta in a footnote may occasionally assume great precedential value. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

prevailing notion that "summary judgment" might well be "the rule rather than the exception" in cases raising the public figure actual malice issue:

> Considering the nuances of the issues raised here, we are constrained to express some doubts about the so-called "rule". The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and does not readily lend itself to summary disposition. *See* 10 *C. Wright & A. Miller, Federal Practice and Procedure* Section 2730, pp. 590-592 (1973). *Cf. Herbert v. Lando*, 441 U.S. 153 (1979).

The Court was correct to be concerned about the institutionalization of such a "rule" throughout the lower state and federal judiciary. In addition to upsetting long-standing principles about the propriety of allowing such state of mind questions to be resolved at trial, *supra* at 11-13, adherence to such a rule would be the functional equivalent, for all practical purposes, of granting libel defendants absolute immunity from suits involving public figures. Statistics bear this out.

Prior to *Hutchinson*, the libel defendants were successful in having the suits brought against them by public figures dismissed approximately 70% of the time. Somewhat surprisingly, that favorable success rate has risen to 76% in the years following the *Hutchinson* decision. Libel Defense Resource Center, Study No. 6, Bulletin No. 12 (Dec. 31, 1984). The reason for this is that the lower courts have consistently been applying the substantive constitutional protection embodied in the *New York Times* clear and convincing evidence standard when making procedural summary judgment determinations. *See, e.g., Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932 (2nd Cir.), *cert. denied*, 449 U.S. 839 (1980).

It is of little value to potential public figure libel plaintiffs to be told that, in legal fact, the media are not

actually being afforded absolute immunity; that all they must do is show actual malice with convincing clarity in order to defeat a motion for summary judgment. The practical consequences are that a public figure plaintiff will almost never get his case before a jury. This is especially true if, as petitioners submit, all a libel defendant must do to make it impossible to prove actual malice with convincing clarity at the summary judgment stage is to submit a sworn affidavit saying he believed in the accuracy of what was published.

In this connection, it should not be overlooked that actual malice is only one of three important elements that a public figure libel plaintiff must establish in order to obtain a favorable verdict trial. The other two elements—that the published statement was defamatory and that it was false—stand independently of the constitutional requirement that actual malice be proven with convincing clarity. Placed in its proper perspective, the actual malice requirement is merely the final requirement prerequisite to an award of monetary damages. Yet winning on these other two elements at trial clearly performs a vindicatory function and can be even more rewarding to a libel defendant than money. *See, e.g., Sharon v. Time, Inc.*, No. 83 Civ. 4660 (S.D.N.Y.). Indeed, according to one recently released academic report: "libel plaintiffs do not sue in order to win money damages, rather they sue to restore their reputations or to punish the media [for injuring their reputation]." Bezanson, Cranberg, Soloski, *Libel and the Press: Setting the Record Straight*, Silha Center for the Study of Media Ethics and Law (May 15, 1985). *See*, Appendix A to this brief at 8a.

It is not at all clear who has the burden of proof in establishing these two other elements or that the Constitution also mandates the extraordinary clear and convincing evidence standard for each. However were this Court to accept petitioners' arguments, these elements would likewise be subsumed in that standard and dis-

missed at the pretrial stage simply because actual malice could not be shown by the plaintiffs with convincing clarity.

Such a result would be entirely contrary to statements by this Court in nearly all of its major libel decisions to the effect that reputational rights are valuable and worthy of vindication. It would be contrary to the public interest in allowing public as well as private figures the opportunity to vindicate their reputations in court. As Justice Fortus so eloquently said:

> The First Amendment is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law.

St. Amant v. Thompson, 390 U.S. 727, 734 (Fortas, J., dissenting).

A recently released study by the Silha Center for the Study of Media Ethics and Law School of Journalism and Mass Communication at the University of Minnesota supports *amicus'* contention that most public figure libel plaintiffs sue to vindicate their reputation rather than for the monetary awards that are theoretically available to them should they prove actual malice with convincing clarity. *See* Appendix A to this brief at 7a. Accordingly, public interest considerations dictate that this Court should deny the near absolute immunity rule surreptitiously being propounded by petitioners.

B. Individuals Will Be Deterred From Entering Public Office, Involving Themselves In Public Affairs, Or Speaking Out On Matters Of Public Importance If, Through The Application Of The Clear And Convincing Evidence Standard At The Summary Judgment Stage Of A Libel Suit, They Are Effectively Deprived Of Any Means To Vindicate Their Reputations Before A Jury

The sanctioning by this Court of the current judicial practice of burdening public figure libel plaintiffs with the clear and convincing evidence standard would be tantamount to affording libel defendants an absolute immunity. This, in turn, would deter individuals from engaging in public affairs or from exercising their First Amendment right to speak out on matters of public importance.

In an original study published by the American Legal Foundation, the argument was made that the *New York Times* actual malice doctrine may be having the perverse effect of actually encouraging persons to attack the reputations of public officials and public figures through the dissemination of defamatory falsehoods. This consequently works to obstruct the ability of the government to recruit talented individuals to elective office. B. Fein, New York Times v. Sullivan: *An Obstacle to Enlightened Public Discourse and Government Responsiveness to the People.* (American Legal Foundation, No. 1, 1984).

The same arguments are equally valid when applied to the question of whether the convincing clarity evidential standard should be required at the summary judgment stage. If the actual malice standard paradoxically encourages character assassination and makes it all but impossible to succeed at trial, *a fortiori* then, insulating libel defendants even further from the mere potential *threat* of potential liability at trial will result in a worsening of this situation.

This necessarily would result in chilling in the legitimate exercise of a public figure's First Amendment rights. For as one commentator has explained:

> [T]he utilization of a liberal summary judgment rule may inhibit public figures from expressing their views on important issues. Unless public figures are assured a viable judicial remedy, they may hesitate or refuse to speak out on controversial issues likely to attract attention or draw fire from the media. As a result, not only are the first amendment rights of public figures abridged, but also the "uninhibited, robust, and wide open" public debate which *New York Times* sought to encourage is effectively reduced. In this sense, the first amendment argument so ardently advanced by proponents of the liberal rule is a double-edged sword.

Ligansky, *Summary Judgment in Defamation Actions: A Threat to the Substantive Rights of Public Figure Plaintiffs*, 3 Cardozo L. Rev. 105, 125 (1981) (footnote omitted).

CONCLUSION

For all of the foregoing reasons, this Court should affirm the United States Court of Appeals for the District of Columbia's holding that the clear and convincing evidence standard is inapplicable at the summary judgment stage of a public figure libel suit.

Respectfully submitted,

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APPENDIX

APPENDIX

The 1985 Silha Lecture
University of Minnesota
May 15, 1985

LIBEL AND THE PRESS
Setting the Record Straight *

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The Study

Considering the amount of coverage libel suits have received in the popular media and the amount of time spent discussing the problem of libel at professional meetings, it is surprising that we know next to nothing about libel plaintiffs and the reasons they sue. To remedy this, we collected data from six sources: (1) an in-depth study

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* Although the complete report runs to 35 pages, it has been abridged in the interest of judicial economy. The instant Appendix consists of only pages 4 through 11 which summarize the major findings contained in the Report.

of all reported defamation and privacy cases decided between 1974 and 1984; (2) a detailed survey of libel plaintiffs; (3) a detailed study of media defendants; (4) a series of in-depth interviews conducted at selected media organizations; (5) a series of in-depth interviews with attorneys who represent media organizations; and (6) a survey of attorneys who have represented libel plaintiffs. Due to time limitations, we will concentrate on the plaintiff and defendant surveys and on our study of defamation and privacy cases decided between 1974 and 1984.

Defamation and Privacy Cases

The first data set is composed of all defamation and privacy cases reported between *Gertz v Welch* in 1974 and mid-1984. All cases were included in which libel or invasion of privacy was a cause of action, and included both media and non-media defendants. In all, nearly 900 cases were identified, coded and entered into a computerized data base. Although this data set does contain privacy cases, we will deal only with defamation cases in our presentation. Some of the key findings we have been able to cull from these data are:

—about seven of every 10 libel cases involve members of the news media.

—over half of the libel cases involving the media are the result of stories that deal with the plaintiffs' business or professional activities.

—less than a fifth of the libel cases involving the media are the result of stories that focus on the plaintiffs' moral conduct.

—individuals who are public figures or public officials are the plaintiffs in about 55 percent of the libel cases against the media.

—the constitutional privilege of negligence or malice is the central legal issue in nearly 90 percent of the libel cases brought against the media.

—plaintiffs win only 10 percent of the cases, while the media win 90 percent of the cases.

Based on our study of defamation cases, we can say that the typical libel case involving the media is brought by a public figure or public official; that the alleged libelous story deals with the plaintiff's business or professional activity; that the main legal argument focuses on the media's negligence or malice in reporting the story; and the libel plaintiff has no more than a one in 10 chance of winning his or her suit.

The Plaintiffs

In discussing the results of the survey of libel plaintiffs, we will offer only general conclusions because we are just beginning a second set of interviews. Obtaining the cooperation of libel plaintiffs was the single most difficult task of the entire study. Not surprisingly, libel plaintiffs are often reluctant to answer personal questions about their experiences and, in some cases, their attorneys recommended that they not participate in our study. Despite the difficulty of obtaining interviews, we did manage to complete interviews with 114 plaintiffs who had sued the mass media for libel. Some of the key findings obtained from the survey are:

—unlike other civil torts, individuals and not organizations account for most of the libel suits brought against the media.

—most libel plaintiffs are between the ages of 36 and 64.

—most libel plaintiffs are well-educated, with about a third holding graduate or professional degrees.

—most libel plaintiffs are well-off financially, with more than a third having incomes greater than $50,000 a year.

—most libel plaintiffs are well-established members of their communities; more than half have lived in their communities more than 30 years.

—most libel plaintiffs are highly visible members of their communities.

—libel plaintiffs tend to be employed in law enforcement, as non-elected public officials, as elected public officials, or as professionals.

—for most liberal [sic] plaintiffs, their libel suit represents the only time that they have filed suit. Only a small percentage of libel plaintiffs reported that they had been involved in other suits against the media.

The data about libel plaintiffs tell us that the typical libel plaintiff is a well-educated, middle-age male who earns a substantial income. In addition, the typical libel plaintiff is a long-time resident of his community, and he is a highly-visible member of his community. And the typical libel plaintiff is either an elected official, works as a professional or works in law enforcement.

The Libel

Despite being outnumbered by nearly six to one by broadcasting stations, daily newspapers are the medium most often sued for libel. We found that newspapers were sued in over two-thirds of the cases, while broadcasters were sued in less than 15 percent of the cases. Contrary to the popular myth that says libel suits are the result of hard-hitting, investigative news stories that run on front pages under banner headlines, we found that most libel suits do not involve front page stories. Only about 40 percent of the libel suits we studied were the result of stories that appeared on the front page of a newspaper.

One editor we interviewed summed up this finding quite nicely: "Investigative stories are done with great care and are not nearly as troubling as the stories that appear on the inside of the paper. It's the routine stories that rise up and bite you in the ass." We did find that libel suits involving front page stories tend to be brought by plaintiffs who hold elected or non-elected public office or by professionals. Stories that appear on inside pages result in libel suits tend to be brought by business owners and managers or by white-collar employees.

When a plaintiff is a public official or public figure, the allegedly libelous story tends to focus on his or her public or political activities. When a plaintiff is a private individual, the allegedly libelous story deals with his or her criminal activities or with his or her public activities. Specifically, plaintiffs who are elected officials sue over stories that deal with their public or political activities. Plaintiffs who are employed in law enforcement or who hold non-elected public office sue over stories that focus on their public or political activities. And plaintiffs who are employed in business sue over stories that deal with their business or professional activities. But when plaintiffs are employed as professionals, the allegedly libelous story deals either with their public or political activities or with their business or professional activities.

We found that there is a strong correlation between a plaintiff's community visibility and the content of the alleged libelous story. The higher a plaintiff's community visibility, the greater the likelihood that the alleged libel will deal with his or her public or political activities. The lower a plaintiff's community visibility, the greater the likelihood that the allegedly libelous story will deal with his or her business or professional activities.

What is it about the allegedly libelous story that most upset plaintiffs? The vast majority of the plaintiffs we interviewed said that what upset them most about the alleged libelous story was that it was false. Plaintiffs

who are highly visible members of their communities are more likely to state their concerns in terms of falsity, while plaintiffs with low community visibility are likely to state their concerns in terms of reputational harm.

How are libel plaintiffs harmed by the allegedly libelous story? Most libel plaintiffs say that the alleged libel caused them emotional harm. Specifically, libel plaintiffs who are elected officials are likely to say that they suffered emotional harm or damage to their political status. Plaintiffs who work in law enforcement or who hold non-elected public office are likely to say that they suffered emotional harm. Even plaintiffs who work as professionals tend to claim that they suffered emotional harm. The only plaintiffs who are likely to say that they suffered financial loss because of the alleged libel are business owners and managers.

What do libel plaintiffs do after the alleged libelous story is published? Contrary to the opinion of some members of the media, libel plaintiffs do not rush to an attorney in order to sue for libel. Rather the majority of plaintiffs rush to the media and only after dealing directly with the media do they contact an attorney. Plaintiffs who are in the public eye are the most likely to contact the media before contacting an attorney. Specifically, plaintiffs who are elected public officials or who work as professionals are likely to contact the media before they contact an attorney. On the other hand, plaintiffs who work in business are more likely to contact an attorney instead of the media. And what do plaintiffs ask the media to do? Almost all plaintiffs ask the media to run a retraction, correction or apology.

As would be expected, the media turn down most of the plaintiffs. And it is then that the plaintiffs contact an attorney. About half of the plaintiffs contact an attorney to obtain advice on what to do next, but the other half of the plaintiffs contact an attorney with the specific purpose of suing the media for libel. The plaintiffs who are the

most likely to contact an attorney having already made up their minds to sue are those plaintiffs who contacted the media first. Plaintiffs who are in the public eye are the most committed to suing for libel. But these are the same plaintiffs who will contact the media about the allegedly libelous story before they contact an attorney. It is interesting to note these plaintiffs are the most likely to say that they were very angry and upset by their contact with the media.

Why, then, do plaintiffs sue for libel? Do plaintiffs see their libel suit as an opportunity to profit by winning large damage awards? In short, the answer is no. Most plaintiffs said that they sued in order to punish the media and to restore their reputations. Only about a quarter of the plaintiffs said that they sued to win money damages.

It seems to us that a number of valuable findings can be derived from the data we have collected from libel plaintiffs.

Some of the more pertinent findings are:

—libel plaintiffs are important members of their communities who hold jobs of great responsibility.

—libel plaintiffs hold jobs that place them in the public eye. The ability of plaintiffs to successfully perform their jobs is related to the plaintiffs' reputation in the community.

—libel plaintiffs perceive the alleged libel as a direct threat to their positions within the community.

—libel plaintiffs defend themselves by claiming that the allegedly libelous story was false.

—libel plaintiffs do not suffer financial loss because of the alleged libel, rather they claim that the libel causes them emotional suffering.

—libel plaintiffs tend to contact the media about the alleged libel before they contact their attorney.

—libel plaintiffs do not sue in order to win money damages, rather they sue to restore their reputations or to punish the media.

—libel plaintiffs are not litigious, for most plaintiffs, this is the first and only time they have filed suit.